

No. 16186

United States
Court of Appeals
for the Ninth Circuit

AMERICAN MAIL LINE, LTD., a Corporation,

Appellant,

vs.

TOKYO MARINE & FIRE INS. CO, LTD., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

DECEMBER 3 1958

PAUL P. O'BRIEN, CLERK

No. 16186

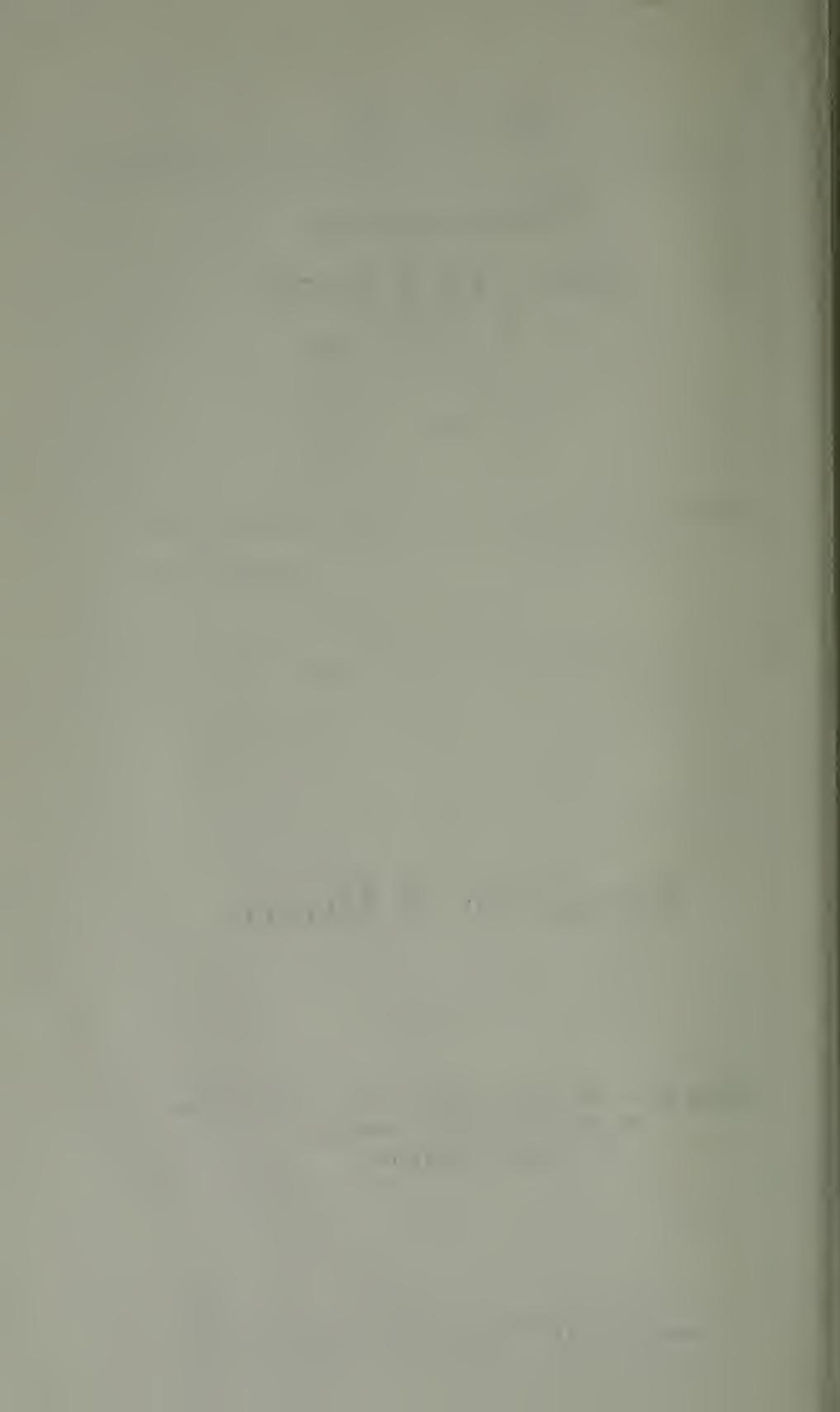
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

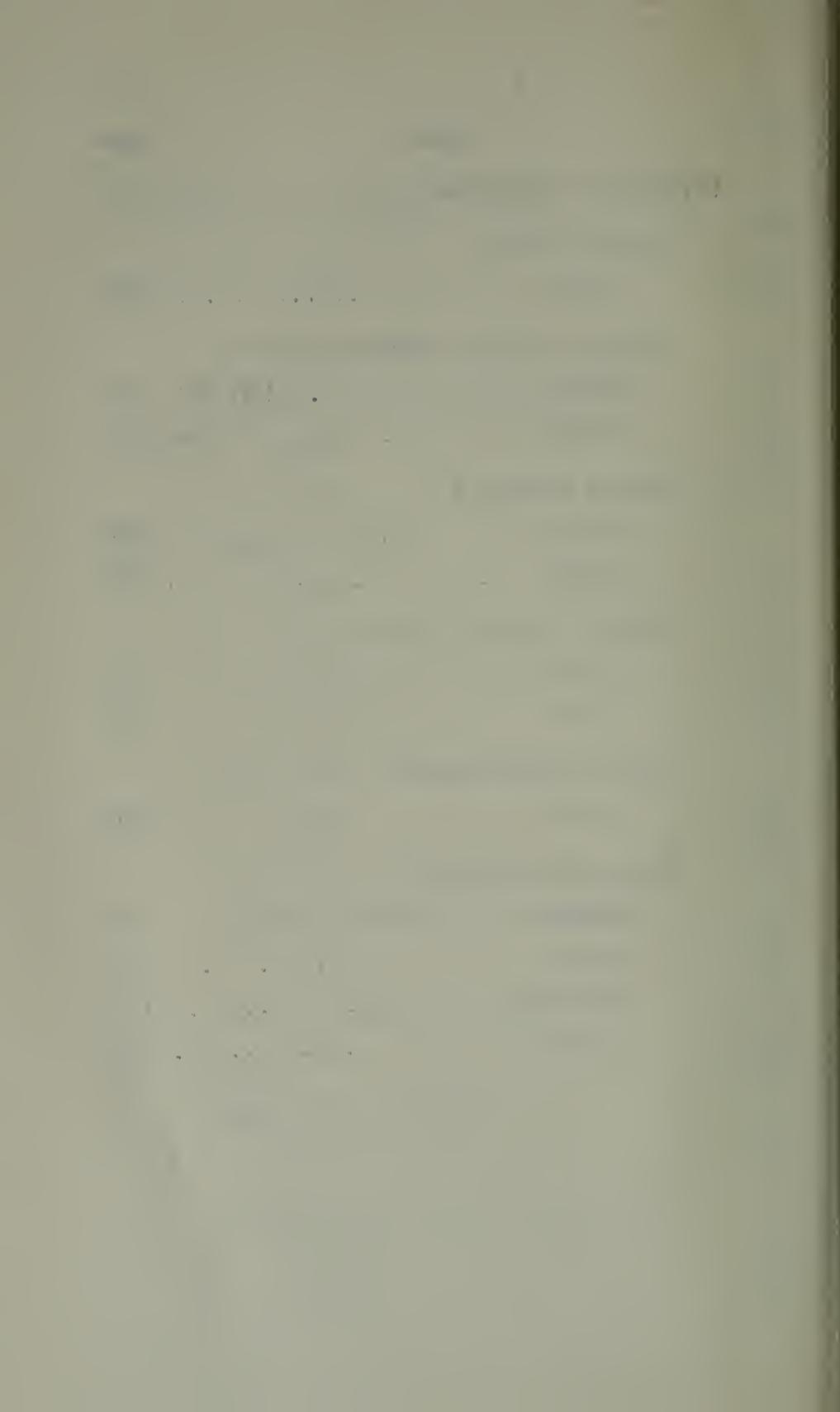
	PAGE
Answer and Cross-Libel	7
Answer to Cross-Libel	15
Appeal:	
Certificate of Clerk to Record on.....	300
Cost Bond on.....	37
Notice of	40
Statement of Points on.....	305, 306
Certificate of Clerk to Record on Appeal.....	300
Cost Bond on Appeal and Supersedeas Bond..	37
Court's Oral Opinion	20
Decree	35
Findings of Fact and Conclusions of Law.....	23
Libel	3
Notice of Appeal	40
Pretrial Order	17
Pretrial Stipulation	18
Proctors, Names and Addresses of.....	1
Statement of Points, Appellee's.....	306
Statement of Points, Appellant's.....	305

	INDEX	PAGE
Stipulation of Additional Matters to Be Included in Record.....		303
Statement of Facts		41
Witnesses:		
Bennett, David L. (Deposition)		
direct		169
cross		173
Gow, James C.		
direct		175
cross		201
redirect		217
recross		218
Greenwood, Harry Albert		
direct		220
cross		227
Hardie, Wallace C. (Deposition)		
direct		257
Jacobs, Harry Denham		
direct		288
McGinitie, Marshall		
direct		218
McLeod, Norman G. (Deposition)		
direct		163
cross		166

INDEX**PAGE**

Witnesses—(Continued)

LaMade, Paul	
direct	285
Palmer, Rodney (Deposition)	
direct	127, 278, 282
cross	160, 280
Smith, Charles V.	
direct	239
cross	255
Tomlin, Norman Lewis	
direct	42
cross	63
Williams, Thomas H.	
direct	239
Wilmarth, Richard C.	
direct	72
cross	105
redirect	123
recross	126





NAMES AND ADDRESSES OF PROCTORS

MESSRS. BOGLE, BOGLE & GATES,

Central Building,

Seattle 4, Washington,

Proctors for Appellant.

MESSRS. EVANS, McLAREN, LANE, POWELL
& BEEKS,

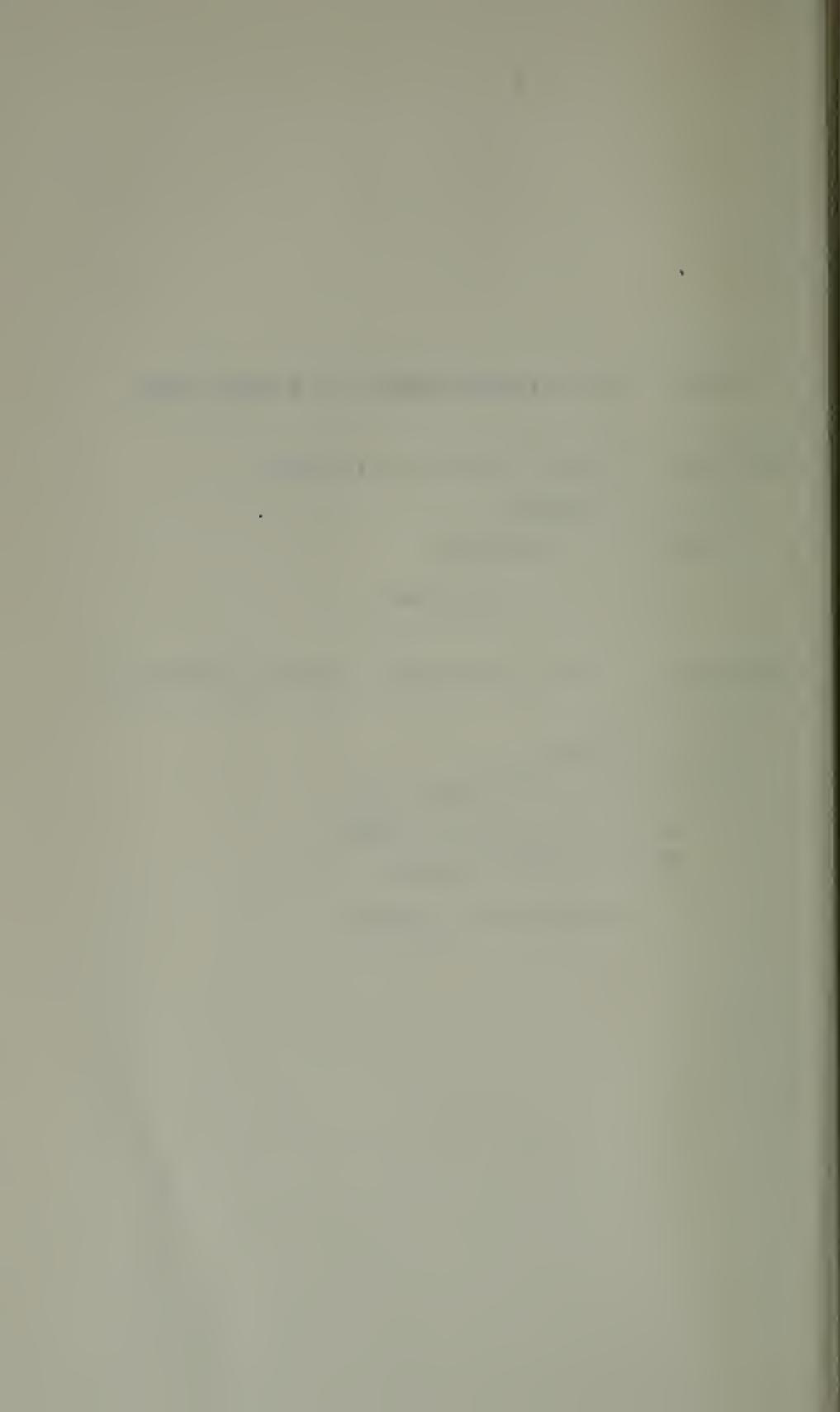
W. T. BEEKS,

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1111 Dexter Horton Bldg.,

Seattle 4, Washington,

Proctors for Appellee.



In the District Court of the United States for the Western District of Washington, Northern Division

In Admiralty No. 16232

**TOKYO MARINE & FIRE INSURANCE, CO.,
LTD., a Corporation,**

Libelant,

vs.

AMERICAN MAIL LINE, LTD., a Corporation,

Respondent.

LIBEL

To the Honorable Judges of the Above-Entitled Court:

The Libel of Tokyo Marine & Fire Insurance Co., Ltd., against American Mail Line Ltd., in a cause of cargo loss, civil and maritime, respectfully alleges and shows:

I.

Libelant is now and was at all times hereinafter mentioned a corporation duly created, organized and existing under and by virtue of the laws of Japan with an office and place of business in the City of Tokyo, Japan, and was at all material times engaged in the business of marine insurance including the insuring of merchandise during sea transit.

II.

At all times herein mentioned, respondent was and now is a corporation organized under and existing by virtue of the laws of the State of Dela-

ware, with its principal office and place of business in the City of Seattle, State of Washington, within this District and Division; and was and is the owner and operator of the SS Oregon Mail, a general ship engaged in the transportation of cargo for hire between, among other places, the ports of Vancouver, Washington, and Shimizu, Japan.

III.

On or about the 18th day of August, 1955, Powell Grain Co., Inc., as shipper, delivered to the respondent at the port of Portland, Oregon, 4,409,200 lbs. of No. 2 Rowed Western Barley in good order and condition to be loaded aboard the SS Oregon Mail and promptly carried to the port of Shimizu, Japan, and there discharged and delivered in the same good order and condition as when received, to the order of the shipper, notify F. Kanematsu & Co., Ltd., all in consideration of an agreed freight and in accordance with the terms of Bill of Lading No. VW-1-S, then and there duly issued by respondent to the shipper.

IV.

Thereafter respondent's vessel SS Oregon Mail having on board the aforesaid shipment, sailed from the port of Vancouver, Washington, for the port, among others, of Shimizu, Japan. At said port of Shimizu, respondent failed to make delivery of the full quantity of barley received by respondent at the port of Vancouver, Washington, and shipped on board the SS Oregon Mail, but wholly failed to deliver to the owner thereof, either at that port or

at any other port or place, 844,031 lbs. of barley, comprising part of the aforesaid shipment.

V.

Prior to the arrival of the SS Oregon Mail at Shimizu, Japan, F. Kanematsu & Co., Ltd., became the endorsee and holder of Bill of Lading VW-1-S, and the owner of the barley shipped thereunder. The agreed freight has been paid to respondent, and the shipper and F. Kanematsu & Co., Ltd., have performed all valid terms and conditions of said contract of carriage on their part to be performed.

VI.

Libelant was at all material times the marine insurer of the shipment described and referred to in this Libel, and as such insurer was liable to the owner thereof for any loss or damage sustained by said shipment during the course of transportation from the port of Vancouver, Washington, to the port of Shimizu, Japan, on the SS Oregon Mail as aforesaid. In due course, libelant was called upon to pay and did pay to the owner of said shipment a claim for loss arising by reason of the failure of the vessel and respondent to make delivery at the port of Shimizu, Japan of 823,026 lbs. of barley from the shipment so insured and covered by the Bill of Lading issued as aforesaid; libelant thereby and thereupon became subrogated to the rights of the owner of said shipment in respect of said owner's claim against respondent for breach of the contract of carriage set forth above.

VII.

By reason of the premises, libelant has sustained damage in the sum of U. S. \$26,065.06, no part of which has been paid by or on behalf of the respondent, although payment thereof has been duly demanded.

VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against respondent, American Mail Line, Ltd., citing it to appear and answer under oath all and singular the allegations aforesaid, and that respondent be decreed to pay libelant's damage in the amount of \$26,065.06 with interest thereon at the legal rate of six (6%) per cent per annum from the 16th day of September, 1955, together with libelant's costs of Court, and that libelant have such other and further relief as to the Court may seem just.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ W. T. BEEKS,

/s/ MORT P. DETELS, JR.,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed August 22, 1956.

[Title of District Court and Cause.]

ANSWER AND CROSS-LIBEL

Respondent for answer to the libel herein admits, denies and alleges:

I.

Respondent does not have sufficient information to form a belief as to matters alleged in paragraph I of the libel and therefore requires strict proof thereof.

II.

Respondent admits paragraph II of the libel.

III.

Respondent admits paragraph III of the libel.

IV.

Respondent admits paragraph IV of the libel.

V.

Respondent does not have sufficient information to form a belief as to the matters alleged in paragraph V of the libel and therefore requires strict proof thereof.

VI.

Respondent does not have sufficient information to form a belief as to the matters alleged in paragraph VI of the libel and therefore requires strict proof thereof.

VII.

Respondent denies that libelant sustained loss or damage in the sum of \$26,065.06, and requires of

libelant strict proof as to the actual value of the aforesaid 844,031 pounds of barley said to be short in said shipment upon discharge at destination.

VIII.

Further answering said libel respondent alleges:

1. That the said SS Oregon Mail sailed from the Port of Portland, Oregon on or about August 18, 1955, and thereafter loaded additional cargo at Longview, Washington, Vancouver, B. C. and Seattle, Washington, in the regular course of its voyage. That at the Port of Seattle, Washington on or about August 22, 1955, at about 12 o'clock, a smoldering fire was discovered in and burning the said shipment of bulk barley in No. 1 lower hold of the SS Oregon Mail. That said fire resulted from an electric flood light in the after port corner of the No. 1 lower hold hatch coaming which was turned on by mistake and left on, after the bulk barley had been loaded. That as a result a portion of the said bulk barley in No. 1 lower hold was burned, charred and smoke damaged to the extent of the 844,031 pounds alleged in the libel herein and said amount was thereafter discharged from said vessel at Seattle, Washington and not carried to destination.

2. That the bill of lading issued for the shipment referred to in the libel in paragraph 1 thereof is expressly made subject to the terms and conditions of the United States Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304) which provides in said Section 4(2)(b) as follows:

“(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(b) fire, unless caused by the actual fault or privity of the carrier * * *.”

3. That said fire and resulting damage to bulk barley was the sole cause and extent of loss or damage to the cargo which is the subject matter of the libel herein. That said fire was caused and resulted without any fault or privity of the respondent and that respondent is not therefore liable for such loss or damage.

IX.

Further answering said libel respondent alleges:

1. That the fire and all resulting loss and damage to libellant's shipment as set forth in paragraph VIII (1) above if resulting from any fault or negligence of the respondent or the said vessel was solely due to the fault or negligence of the officers or crew of the said vessel and that such negligence constituted faults or errors in navigation or in the management of the vessel for which respondent and the said vessel is excused from liability by virtue of Section 4(2)(b) of the United States Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304) to which said Act, said bill of lading is expressly made subject in paragraph I thereof and which provides as follows:

“(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship * * *."

X.

Further answering said libel respondent alleges:

1. That as a result of said fire, burning, chartering and heating of cargo on board the Oregon Mail involving a portion of the cargo of bulk barley which is the subject matter of the libel herein the respondent necessarily incurred certain reasonable General Average expenses in connection with extinguishing the fire and the discharging and re-loading of certain cargoes, all of which were necessary for the safety and preservation of the ship and cargo and for the completion of the venture which was completed and the cargo delivered, in an amount not now definitely determined and respondent also necessarily incurred certain reasonable and proper special charges in connection with said cargo covered under its bill of lading VW-1-S in an amount not now definitely determined for all of which expenses respondent became entitled to a lien upon said cargo covered under bill of lading VW-1-S for its proportionate contribution to the General Average expenditures and the payment of the special charges.

2. That respondent pursuant to the terms and conditions of said bill of lading VW-1-S in paragraph 10 thereof has declared a General Average

with respect to the matters herein alleged and that Horder, Jacobs & Speck, Inc., of Seattle, Washington have been appointed General Average adjusters and are now adjusting and settling the General Averages and the special charges with respect to all interests involved including the cargo covered under the aforesaid bill of lading VW-1-S, which is the subject matter of the libel herein. That the owner of said cargo heretofore and in consideration of the delivery of said cargo, executed a General Average agreement undertaking to pay such General Average contribution and special charges.

3. That said bill of lading VW-1-S contains among other provisions the following agreement in paragraph 10 thereof with respect to the General Average and special charges:

“In the event of accident, danger, damage or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. * * *”

4. That by virtue of the foregoing matters of General Average and special charges the owner of

said cargo being the libelant's assignor became and is indebted to respondent for the payment of a General Average contribution and of special charges in respect of said cargo, the exact amounts of which have not been finally determined and that when so determined respondent will ask leave of court to amend this answer to set forth said amounts. That no part of said General Average contribution or special charges has been paid the respondent in respect of and due from the cargo carried under bill of lading VW-1-S and libelant is liable therefor in such sum as is finally determined pursuant to the adjustment of the General Average and the statement of the special charges.

5. That in the event of any recovery in this cause on behalf of libelant respondent is entitled to offset all amounts found due for General Average and special charges in respect of the cargo covered under respondent's bill of lading VW-1-S.

Cross-Libel Against Libelant Tokyo Marine &
Fire Insurance Co., Ltd., a Corporation

Respondent and Cross-libelant, American Mail Line, Ltd., for cross-libel herein against libelant and Cross-respondent, Tokyo Marine & Fire Insurance Co., Ltd., a corporation, respectfully alleges:

I.

Respondent realleges subparagraphs 1, 2, 3 & 4 of paragraph X of respondent's foregoing answer to

the libel and by reference fully incorporates the same herein.

II.

That cross-respondent and/or its assignor as owner of the cargo carried and delivered by cross-libelant on its vessel Oregon Mail under bill of lading VW-1-S heretofore and in consideration of the delivery of said cargo executed and delivered to cross-libelant a General Average agreement whereby it was agreed that General Average and special charges in respect of said cargo would be paid by cross-respondent and/or its assignor according to the General Average adjustment as finally issued by the adjuster of the General Average.

III.

That cross-respondent and/or its assignor is indebted to cross-libelant and to the General Average in the sum of the general average contribution and the special charges due from the cargo carried pursuant to said bill of lading VW-1-S in such sum as is hereafter finally determined to be due according to the General Average adjustment.

IV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, respondent and cross-libelant pray as follows:

1. That the libel herein be dismissed with prejudice and that respondent recover its costs.
2. That in the event of any recovery by libellant, the amount determined to be due for general average contribution and for special charges in respect of such cargo be offset against libellant's recovery herein.
3. That cross-libellant have and recover from cross-respondent such amount as is finally determined by the General Average adjustment to be due from cross-respondent and/or its assignor for general average contribution and for special charges in respect of the shipment carried and delivered under cross-libellant's bill of lading VW-1-S.
4. That respondent and cross-libellant have and recover such other and further relief to which it may be entitled herein.

BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ M. BAYARD CRUTCHER,
Proctors for Respondent.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 30, 1956.

[Title of District Court and Cause.]

ANSWER TO CROSS-LIBEL

Libelant and cross-respondent, for answer to the cross-libel herein, admits, denies and alleges:

I.

Answering Paragraph I of the cross-libel which incorporates the allegations of subparagraphs 1, 2, 3 and 4 of Paragraph X of respondent's answer to the libel, admits, denies and alleges as follows:

(1) Denies each and every allegation contained in subparagraph 1;

(2) Admits that respondent has declared a General Average, but denies that a General Average accident occurred and denies that a General Average was properly declared; admits that Horder, Jacobs & Speck, Inc., of Seattle, Washington have been appointed by respondent as General Average adjusters; admits that an Average Agreement was executed by F. Kanematsu & Co., Ltd., libelant's subrogor, which agreement was delivered to and is in the possession of respondent; and except as thus admitted, denies the allegations contained in said subparagraph;

(3) Admits the allegations of subparagraph 3;

(4) Denies each and every allegation contained in subparagraph 4.

II.

Answering Paragraph II of the cross-libel, admits that an Average Agreement was executed by F. Kanematsu & Co., Ltd., the owner of the cargo, and delivered to cross-libelant, but denies each and every other allegation therein contained.

III.

Answering Paragraph III, denies the same.

IV.

Answering Paragraph IV, admits the admiralty and maritime jurisdiction of this Honorable Court, but except as thus admitted, denies each and every allegation therein contained.

Further Answering Said Cross-Libel, Cross-Respondent Alleges:

I.

On information and belief, that cross-libelant took possession of a portion of the barley shipped under its bill of lading VW-1-S and sold the same for \$15,368.89, and now retains said proceeds of sale, no part of which has been paid to cross-respondent except the sum of \$9,328.89, which sum was paid on the 15th day of April, 1958, and that respondent, or its transferee or transferees, retains the balance of the proceeds from the sale of said barley.

Wherefore, libelant and cross-respondent prays as follows:

1. That the cross-libel herein be dismissed with prejudice and that cross-respondent recover its costs.
2. Repeats and by reference incorporates herein the prayer of its libel.

EVANS, McLAREN, POWELL
& BEEKS,

/s/ W. T. BEEKS,

/s/ MARTIN P. DETELS, JR.,
Proctors for Libellant.

Duly verified.

[Endorsed]: Filed May 5, 1958.

[Title of District Court and Cause.]

PRETRIAL ORDER

It appearing to the court that the parties have so stipulated, and the court having duly considered the pretrial stipulation of the parties, it is now

Ordered:

1. That the pretrial stipulation between the parties be and it is hereby adopted as the Pretrial Order of this Court.
2. It Is Further Ordered that the exhibits which have been identified and marked by proctors may be received in evidence if otherwise admissible with-

out further authentication, it being admitted that each is what it purports to be.

Done in Open Court this 6th day of May, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

Approved and presented by:

/s/ MARTIN P. DETELS, JR.
Of Proctors for Libelant.

/s/ M. BAYARD CRUTCHER,
Of Proctors for Respondent.

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION

It Is Agreed between the parties as follows:

Libel

Respondent admits the allegations of Articles I and V. Respondent admits the allegations of Article VI, except the figure of 844,031 lbs., on page 3, line 6. The parties agree that the figure of 823,026 lbs. should be substituted in place of 844,031 lbs.

Answer and Cross-Libel

Libelant admits that it gave a general average agreement as alleged on page 4, at line 21, and that the copy thereof in possession of respondent is au-

thentic. Libelant agrees to accept a memorandum computation of general average charges and special average charges as sufficient amendment of the answer, page 5, paragraph 4.

Expert Witnesses

Neither party to this suit will call more than three expert witnesses to express an opinion whether there was a fire in the barley; but this stipulation shall not preclude eyewitnesses from expressing their conclusions or opinions, if such evidence is otherwise admissible.

Damages

The value of the barley described in the libel was \$62.29 per metric ton, cost and freight, plus cost of insurance at 20c per \$100 of invoice value. The total value of the 823,026 lbs. of barley not delivered to libelant's assured was \$23,301.43.

Sale of Salvaged Barley, and Application of Proceeds of Salvage

The reasonable value of salvaged barley left at Seattle after the departure of the vessel was \$15,-368.89. Of this amount, \$9,328.89 was delivered to libelant on April 15, 1958. The sum of \$3,540.00 is retained from the aforesaid gross salvage proceeds by Horder, Jacobs & Speck, Inc., average adjusters, as general average deposit for the account of libelant.

Dated at Seattle, Washington this 2nd day of May, 1958.

TOKYO MARINE & FIRE INSURANCE CO., LTD.,

By /s/ MARTIN P. DETELS, JR.,
Of Its Proctors.

AMERICAN MAIL LINE, LTD.,

By /s/ M. BAYARD CRUTCHER,
Of Its Proctors.

[Endorsed]: Filed May 6, 1958.

In the District Court of the United States for the
Western District of Washington, Northern
Division
No. 16232

TOKYO MARINE & FIRE INSURANCE CO.,
LTD.,

Libelant,

vs.

AMERICAN MAIL LINE, LTD., a Corporation,
Respondent.

Before Judge Bowen.

Friday, May 9, 1958

COURT'S ORAL OPINION

The Court: From a preponderance of the evidence in this case the Court finds, concludes and decides as follows:

That this barley was set afire by the improper and negligent burning and use of an electric cargo light whose light rays were directed into the number one hold where this barley was stowed;

That the starting of that fire and its continuing to burn until the vessel arrived in Seattle were the result of negligent acts on the part of members of the ship's crew, in respect to which the respondent as the vessel's owner and operator was not in privity;

That such negligence on the part of the crew members and that fire continued until the vessel arrived in Seattle on the 21st day of August, 1955, after the fire had started in the barley on board the ship on the Columbia River on August 20, 1955, for all of which negligence on the part of such crew members prior to the arrival of the vessel in Seattle on August 21, 1955, the respondent was not and is not in privity.

The Court is clearly convinced by such evidence and by the preponderance thereof that this barley was on fire, that there was a fire in the barley cargo, from the time smoke was first indicated on August 20th. That was shown by the condition of the samples of the barley taken, it is shown by the long continuing emanations of smoke and the registration of smoke on the smoke indicators from the beginning, it is demonstrated by the great amount of heat that was in the samples of the crackling and burning barley taken in buckets out

of the hold of the ship later on at Seattle. No one who has seen burned grain could mistake for any other kind of evidence the scorched fire burned appearance of the samples of the barley in evidence here, as such appearance clearly indicates fire as the cause of the damage to the barley;

That the respondent was, after the ship's arrival in Seattle, guilty of negligent conduct in not properly protecting the cargo in that vessel, in that the respondent's Port Captain, Captain Greenwood, delayed for an unreasonably long time in the use and application to the fire and the area of the fire of CO₂;

That, as disclosed by such evidence, the fire was immediately brought under control by the first use of CO₂. That first use was made in the early morning about 3:00 a.m. on August 24, 1955, and accomplished the results which any prudent person would have in the exercise of due and ordinary care accomplished by similar methods within the first twenty-four hours of the ship's arrival in Seattle, which arrival date was the 21st of August, but on every day thereafter the respondent through its Port Captain, Captain Greenwood, neglected to employ CO₂ as a firefighting and smothering agent, and was negligent, for all of which negligence of Captain Greenwood after the vessel arrived in Seattle the respondent is in privity with him and is liable;

That the libelant, representing the cargo interests respecting the amount of damage sustained by the

cargo on account of this fire, is entitled to recover for the amount prayed for in the libel without any general average deduction in the sum of \$3,540 or any other related deduction, plus a certain interest item on \$9,328, as to which interest item just specified Counsel for both sides have stated their approval.

Libelant is also entitled to recover from respondent as requested in the libel including taxable costs.

Is there any issue not decided by what the Court has said?

(No response.)

[Endorsed]: Filed May 21, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause having come on duly and regularly for trial on the 6th day of May, 1958, and having continued to the 9th day of May, 1958, at Seattle, Washington, before the Honorable John C. Bowen, United States District Judge; libelant appearing by its proctors, Messrs. Evans, McLaren, Lane, Powell & Beeks and Martin P. Detels, Jr., and respondent appearing by its proctors, Messrs. Bogle, Bogle & Gates, M. Bayard Crutcher and Donald McMullen, and witnesses having been sworn and examined, and evidence, both oral and documentary,

having been introduced, and the cause submitted to the Court for decision, and the Court having considered said evidence and having heard oral argument of counsel and being fully advised in the premises, the Court does now make the following:

Findings of Fact

I.

At all times herein mentioned, Tokyo Marine & Fire Insurance Co., Ltd. was and now is a corporation duly created, organized and existing under and by virtue of the laws of Japan, with an office and place of business in the City of Tokyo, Japan, and was and is engaged in the business of marine insurance, including the insuring of merchandise during sea transit.

II.

At all times herein mentioned, respondent American Mail Line, Ltd., was and now is a corporation organized under and existing by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of Seattle, Washington, and was and is the owner and operator of the SS Oregon Mail, a general ship engaged in the transportation of cargo for hire between, among other places, the ports of Vancouver, Washington and Shimizu, Japan.

III.

On or about the 17th day of August, 1955, Powell Grain Co., Inc., as shipper, delivered to respondent at the port of Vancouver, Washington, 4,409,200

pounds of #2 Two Rowed Western Barley in good order and condition, to be loaded aboard the SS Oregon Mail and promptly carried to the port of Shimizu, Japan, and there discharged and delivered in the same good order and condition as when received, to the order of the shipper, notify F. Kanematsu & Company, Ltd., all in consideration of an agreed freight and in accordance with the terms of its On Board Bill of Lading No. VW-1-S then and there duly issued by respondent to the shipper, a copy of which was introduced in evidence herein as libelant's Exhibit No. 6.

IV.

Thereafter, respondent's vessel SS Oregon Mail, having on board the aforesaid shipment, sailed from the port of Vancouver, Washington, for the port, among others, of Shimizu, Japan. At said port of Shimizu, respondent failed to make delivery of the full quantity of barley received by respondent at the port of Vancouver, Washington, and shipped on board the SS Oregon Mail, but wholly failed to deliver to the owner thereof, either at that port or at any other port or place, 823,026 pounds of said barley, comprising part of the aforesaid shipment. The value of the barley shipped under respondent's Bill of Lading No. VW-1-S was \$62.29 per metric ton, cost and freight, plus cost of insurance at \$0.20 per \$100.00 of invoice value. The total value, cost, insurance and freight, of the 823,026 pounds of barley not delivered was \$23,301.43.

V.

Prior to the arrival of the SS Oregon Mail at Shimizu, Japan, F. Kanematsu & Company, Ltd. became the endorsee and holder of Bill of Lading VW-1-S and the owner of the barley shipped thereunder. The agreed freight has been paid to respondent, and the shipper and F. Kanematsu & Company, Ltd. have performed all valid terms and conditions of said contract of carriage on their part to be performed.

VI.

Libelant Tokyo Marine & Fire Insurance Co., Ltd., was at all material times the marine insurer of the shipment described and referred to herein, and as such insurer was liable to the owner thereof for all loss or damage sustained by said shipment during the course of transportation from Vancouver, Washington, to Shimizu, Japan, on respondent's vessel the SS Oregon Mail. In due course, libelant was called upon to pay and did pay to the owner of said shipment a claim for loss arising by reason of the failure of the vessel and respondent to make delivery of 823,026 pounds of barley from the shipment so insured and covered by Bill of Lading VW-1-S. Libelant thereby and thereupon became subrogated to the rights of the owner of said shipment in respect of said owner's claim against respondent for breach of the contract of carriage set forth above.

VII.

A portion of the barley shipped under Bill of Lading VW-1-S was loaded in bulk into the No. 1

hatch of the Oregon Mail. The No. 1 lower hold was filled with said barley, and the loading continued into the No. 1 lower 'tween deck to a height of approximately five feet, the lower 'tween deck hatch covers not having been replaced. The No. 1 lower hold of the SS Oregon Mail was equipped with fixed electric cargo lights, situated in the area of the corners of the hatch opening and fastened to the overhead main beams, on the ceiling. Said lights are controlled from a switch panel located in the No. 1 resistor house, on the forward deck of the vessel between the No. 1 and No. 2 hatches. Said fixed electric cargo lights in the No. 1 lower hold were improperly and negligently turned on or permitted to remain burning after the loading of bulk barley into the No. 1 lower hold of the SS Oregon Mail had commenced, by the negligent act or omission of the ship's officers and crew.

VIII.

The SS Oregon Mail is equipped with a smoke-detecting apparatus, which draws samples of air from the various compartments of the vessel, including the No. 1 lower hold, into the smoke-detector cabinet which is situated in the wheelhouse or bridge. On the evening of August 20, 1955, the vessel being then at Vancouver, B. C., smoke was observed in the smoke-detector cabinet coming from the suction line for the No. 1 lower hold; that at the same time a suspicious odor was detected in the area in which the air from the detector was exhausted; that the vessel's officers then made a search of the accessible spaces of the vessel, and were able to enter all

compartments, except the No. 1 lower hold, which was filled with barley; that upon entering the No. 1 resistor house, the Chief Officer examined the switch panel and found the fuses in place and the switch which controlled the cargo lights in the No. 1 lower hold was on; that no indication of any heat, smoke, odor, or fire was discovered in relation to any compartment of the vessel except the No. 1. lower hold.

IX.

On August 21, 1955, at about 7:00 A.M., the SS Oregon Mail arrived at the port of Seattle, Washington. At that time the odor of smoke was more pronounced in the area of the smoke detecting apparatus, the registration of smoke on the apparatus continued, and smoke was reported coming out of the exhaust vent for the No. 1 hold, situated on the port king post located immediately aft of the No. 1 hatch. The Master of the vessel then called Captain Harry Greenwood, Port Captain for respondent, and reported a suspected fire in the No. 1 lower hold. Captain Greenwood in turn called certain surveyors, including Mr. James Gow, to attend aboard the vessel with him, in representation of the interests of respondent American Mail Line, Ltd., and a further examination of the vessel, including the smoke detector cabinet and exhaust vents for the No. 1 lower hold, was made. At the conclusion of said examination it was determined by Captain Greenwood and the Master of the Oregon Mail that the vessel would continue with the loading of cargo, including cargo to the No. 1 hold, but that a continu-

ous watch would be maintained on the smoke detecting apparatus.

X.

On August 22, 1955, the loading of cargo, including cargo to the No. 1 hold, was continued. At 1:00 P.M. on that date the discharge of cargo from the No. 1 hold was begun to permit observation of the barley stowed in that compartment, and the discharge of cargo from the No. 1 hold of the vessel was continued to the early morning of August 24. At or about 3:05 A.M., August 24, 1955, the use of CO₂, as a smothering agent, was begun, and CO₂ was introduced into the No. 1 lower hold of the vessel by means of the ship's fixed CO₂ system and a portable CO₂ system rigged on the main deck at the No. 1 hatch, and was continued at intervals on August 24, 1955, and into August 25, 1955.

XI.

On August 25, 1955, following the employment of CO₂, the No. 1 hatch was uncovered and barley was discharged from the square of the hatch to at or below the level of the hatch coaming in the No. 1 lower hold; samples of the damaged barley were removed from the No. 1 lower hold, at which time crackling was heard in the barley, which contained a great amount of heat. A sample of the scorched barley was introduced in evidence as libelant's Exhibit No. 2.

XII.

The Court finds and concludes, by the preponderance of the evidence, from the condition and

scorched, fire-burned appearance of libelant's Exhibit No. 2, from the long continuing emanations of smoke and the registration of smoke on the detection apparatus, beginning August 20, 1955, and from the great amount of heat in the crackling barley taken in buckets out of the hold on August 25, 1955, that there was a fire in the barley cargo, which fire existed from the time smoke was first observed on August 20, 1955. The barley was set afire as a proximate result of acts and omissions of the officers and crew of the SS Oregon Mail in the negligent care and custody of the cargo in respect to the negligent burning and use of the electric cargo lights in the No. 1 lower hold of the vessel.

XIII.

The Court further finds and concludes, by a preponderance of the evidence, that respondent was, after the ship's arrival in Seattle on the morning of August 21, 1955, guilty of negligent conduct in not properly protecting the said barley, in that the respondent's Port Captain delayed for an unreasonably long time in the use and application of CO₂. The first application was made about 3:00 A.M. on August 24, 1955, and the fire was promptly brought under control. Such use of CO₂ accomplished results which any prudent person would, in the exercise of due and ordinary care, have accomplished by similar methods within 24 hours of the ship's arrival at Seattle, under the circumstances existing and known to respondent's Port Captain on August 21, 1955, or which, in the exercise of due care, he could

have learned. At all times thereafter that respondent, through its Port Captain, neglected to employ CO₂ as a firefighting and smothering agent, respondent was negligent. Such negligence and fault of respondent's Port Captain is the negligence and fault of respondent. Such negligence of the respondent was a proximate cause of the damage to the said barley.

XIV.

Respondent, in reliance on the provisions of paragraph 10 of its Bill of Lading, as set forth in libellant's Exhibit No. 6 herein, declared a general average with respect to the expense incurred at Seattle, in the loading and reloading of cargo, and application of CO₂, and appointed Horder, Jacobs & Speck, Inc., of Seattle, Washington, to adjust and settle said general average. Said general average statement had not been completed at the time of trial, but libellant's liability for general average contribution as finally determined according to the General Average Statement was placed in issue by respondent's Cross-Libel herein.

XV.

823,026 pounds of damaged barley shipped under Bill of Lading VW-1-S were removed from the No. 1 hold of the Oregon Mail and sold by respondent for \$15,368.89, which is agreed by the parties to be the reasonable value of said damaged barley. In connection with the salvage and sale of said barley, respondent incurred expenses of \$1,490.84, which expenses are agreed by the parties to be reasonable

and proper salvage expenses. On April 15, 1958, respondent paid to libelant, without prejudice to any issue in this proceeding, except the amount of recovery, if any, to libelant, the sum of \$9,328.89. At the time of trial herein, Horder, Jacobs & Speck, Inc., held the sum of \$3,540.00 as a general average deposit for the account of libelant, pending settlement of the general average statement and determination of libelant's liability for general average contribution. At the conclusion of trial, proctor for respondent orally confessed judgment for the sum of \$1,009.16, being the balance of proceeds from the sale of the damaged barley after deduction of the following items: (1) the general average deposit in the amount of \$3,540.00; (2) \$9,328.89 heretofore paid to libelant; and (3) \$1,490.84 salvage expense, together with interest at the rate of 6% per annum on the sum of \$9,328.89 from September 16, 1955, when the balance of the barley shipped under Bill of Lading VW-1-S was delivered at destination, to April 15, 1958.

XVI.

The transcript of the Court's oral opinion filed herein May 21, 1958, is hereby made a part of these findings and conclusions.

From the Foregoing Findings of Fact, the Court Makes the Following:

Conclusions of Law

I.

This Court has jurisdiction of the subject matter of this action in Admiralty.

II.

823,026 pounds of barley shipped aboard respondent's vessel SS Oregon Mail under its Bill of Lading VW-1-S, and having a value, cost, insurance, and freight of \$23,301.43, were not delivered to the owner and endorsee of said Bill of Lading upon the arrival of said vessel at destination on September 16, 1955. Libelant was the insurer of said shipment and is subrogated to the rights of the owner and endorsee of said Bill of Lading against respondent for loss or damage to said shipment.

III.

Said 823,026 pounds of barley were not delivered by reason of having been damaged by fire while aboard respondent's vessel SS Oregon Mail, between the dates of August 20, and August 25, 1955. The fire was caused by negligence of the officers and crew of the vessel. Respondent, through its Port Captain, was guilty of negligence and at fault and in privity, in delaying, after the arrival of the vessel at Seattle, Washington, on August 21, 1955, when said fire had already begun, for an unreasonably long time, in the use and application of CO₂ to the fire. By reason of said fault and privity on the part of respondent, respondent is not excused from liability for non-delivery of the 823,026 pounds of barley, by virtue of the provisions of Section 4(2)(b) of the Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304 (2)(b)).

IV.

The negligence of the officers and crew of the SS Oregon Mail in the burning and use of the electric cargo lights in the No. 1 lower hold of the vessel in the course of transportation of said barley therein was negligence in the care and custody of the cargo, for which respondent is not excused by virtue of the provisions of Section 4(2)(a) of the Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304 (2) (a)).

V.

As a proximate result of the non-delivery of 823,-026 pounds of barley, libelant's subrogor was damaged in the amount of \$23,301.43, of which respondent has heretofore, on April 15, 1958, paid to libelant \$9,328.89.

VI.

Libelant is entitled to recover of and from the respondent the sum of \$13,972.54, with interest at the rate of 6% per annum from September 16, 1955, to and including May 21, 1958, in the amount of \$2,247.24, together with interest at the rate of 6% per annum on the sum of \$9,328.89 from September 16, 1955, to and including April 15, 1958, in the sum of \$1,445.98, together with its taxable costs herein in the amount of \$173.08, said recovery to bear interest at the rate of 6% per annum until paid, and that the libelant shall have execution therefor.

VII.

The Cross-Libel of American Mail Line, Ltd., should be dismissed.

Done in Open Court this 21st day of May, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented as in conformity with the Court's Oral Decision and Approved as to form by:

/s/ MARTIN P. DETELS, JR., of
EVANS, McLAREN, LANE,
POWELL & BEEKS,
Proctors for Libelant.

Copy received:

/s/ M. BAYARD CRUTCHER, of
BOGLE, BOGLE & GATES,
Proctors for Respondent.

[Endorsed]: Filed May 21, 1958.

United States District Court, Western District
of Washington, Northern Division

In Admiralty No. 16232

TOKYO MARINE & FIRE INSURANCE CO.,
LTD., a Corporation,

Libelant,

vs.

AMERICAN MAIL LINE, LTD., a Corporation,

Respondent.

DECREE

This Cause having heretofore come on trial before
the undersigned Judge of the above-entitled Court

on May 6, 1958, both parties being then present through their respective proctors of record, and witnesses having been sworn and examined, and evidence introduced by each of the parties, and the Court having duly considered the same, and arguments and briefs of counsel, and being fully advised in the premises, and having made and entered the Court's Findings of Fact and Conclusions of Law pursuant to the decision of the Court rendered upon the conclusion of the trial of this cause, finding and concluding that libelant was entitled to recover of and from respondent the sum of \$13,972.54 with interest at the rate of 6% per annum from September 16, 1955, to and including May 21, 1958, in the amount of \$2,247.24, in addition to an item of interest at the rate of 6% per annum on the sum of \$9,328.89 from September 16, 1955, to and including April 15, 1958, in the sum of \$1,445.98, together with libelant's taxable costs herein in the sum of \$173.08, it is now, therefore,

Ordered, Adjudged and Decreed as follows:

1. That the libelant, Tokyo Marine & Fire Insurance Co., Ltd., recover herein against respondent American Mail Line, Ltd., the sum of \$13,972.54, together with interest in the sum of \$2,247.24, together with the further sum of \$1,445.98 as interest on the amount heretofore paid by respondent to libelant, and the further sum of \$173.08, costs as taxed, making in all the sum of \$17,838.84, said recovery to bear interest at the rate of 6% per annum from the date of entry of this decree until paid.

2. That unless this decree be satisfied or proceedings thereon stayed within thirty days after entry of this decree, libelant shall have execution against respondent and its stipulator, their goods, chattels and lands, forthwith to satisfy this decree.

3. That the Cross-Libel of American Mail Line, Ltd., against Tokyo Marine & Fire Insurance Co., Ltd., be and the same is hereby dismissed with prejudice.

Done in Open Court this 21st day of May, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

Approved and Presented by:

/s/ MARTIN P. DETELS, JR., of
EVANS, McLAREN, LANE,
POWELL & BEEKS,
Proctors for Libelant.

Copy Received.

[Endorsed]: Filed May 21, 1958.

Entered: May 22, 1958.

[Title of District Court and Cause.]

COST BOND ON APPEAL AND
SUPERSEDEAS BOND

Know All Men by These Presents:

That the undersigned, American Mail Line, Ltd., a corporation, as principal, and Fireman's Fund

Indemnity Company, a corporation organized under the laws of the State of California and authorized to transact business as surety in the State of Washington, as Surety, are held and firmly bound unto Tokyo Marine & Fire Insurance Co., Ltd., a corporation, libelant in the above matter, in the penal sum of Seventeen Thousand Five Hundred (\$17,500) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, the said principal and the said surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed, Sealed and Executed this 22nd day of July, 1958.

Whereas, the above-named respondent and principal is in the process of appealing to the United States Court of Appeals for the Ninth Circuit from a decree of the District Court of the United States for the Western District of Washington, Northern Division, bearing date 21st day of May, 1958, in a suit in which Tokyo Marine & Fire Insurance Co., Ltd., a corporation, is libelant and American Mail Line, Ltd., a corporation, is respondent, which decree orders the said respondent to pay libelant the sum of \$17,838.84; and whereas, respondent has paid into Court the sum of \$2,616.74 in partial satisfaction of said decree; and whereas, said respondent desires, during the progress of such appeal, to stay the execution of the said decree of the District Court:

Now, Therefore, the condition of this obligation is such that if the above-named respondent, American Mail Line, Ltd., shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void, otherwise, the same shall be and remain in full force and effect.

AMERICAN MAIL LINE, LTD.,
A Corporation;

BOGLE, BOGLE & GATES,
By /s/ CLAUDE E. WAKEFIELD,
Its Attorneys.

[Seal] FIREMAN'S FUND
INDEMNITY COMPANY,

By /s/ CLAUDE E. WAKEFIELD,
Its Attorney in Fact.

The above Cost Bond and Supersedeas Bond is hereby approved.

Done in Open Court this 24th day of July, 1958.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ DONALD McMULLEN.

Approved as to form and amount of bond:

/s/ MARTIN P. DETELS, JR.,
Proctor for Libelant.

[Endorsed]: Filed July 24, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that American Mail Line, Ltd., respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree entered in this cause on the 21st day of May, 1958, excepting that part of the decree which allows libelant sums for which respondent confessed judgment at time of trial, more particularly, the sum of \$1,445.98 as interest mentioned in paragraph 1, and the sum of \$1,009.16 as balance of proceeds mentioned in Findings of Fact XV made and entered by the Court in this cause on the same date, with interest thereon.

Dated August 12, 1958.

BOGLE, BOGLE & GATES,
/s/ M. BAYARD CRUTCHER,
/s/ DONALD McMULLEN,
Proctors for Appellant
American Mail Line, Ltd.

Receipt of copy acknowledged.

[Endorsed]: Filed August 12, 1958.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 16232

**TOKYO MARINE & FIRE INSURANCE CO.,
LTD., a Corporation,**

Libelant,

vs.

AMERICAN MAIL LINE, LTD., a Corporation,

Respondent.

STATEMENT OF FACTS

Be It Remembered, that the above-entitled and numbered cause was heard before the Honorable John C. Bowen, a Judge of the above-entitled Court sitting in Department No. 1 thereof without a jury, beginning Tuesday, May 6, 1958, at 11:45 o'clock a.m.

The Libelant was represented by Mr. Martin P. Detels, Jr., of Messrs. Evans, McLaren, Lane, Powell and Beeks, Attorneys at Law.

The respondent was represented by Mr. M. Bayard Crutcher and Mr. Donald McMullen, of Messrs. Bogle, Bogle and Gates, Attorneys at Law.

Whereupon, the following proceedings were had and done, to wit: [1*]

* * *

Mr. Detels: If the Court please, the libelant's case in chief is established by admissions contained

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

in the pleadings or in the stipulation of Counsel, and unless the Court wishes me to do so I will not read the pleadings and admissions. [9]

* * *

NORMAN LEWIS TOMLIN

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name and spell your last name for the Court?

A. Norman Lewis Tomlin, T-o-m-l-i-n.

Q. Where is your home address?

A. 7406 Tacoma Avenue South, Tacoma.

Q. What is your occupation?

A. Second officer on the SS Oregon Mail.

Q. And is that vessel presently in Seattle?

A. Yes.

Q. Is it scheduled to sail tonight? A. Yes.

Q. Now, Mr. Tomlin, how long have you been in the merchant [17] marine?

A. Fifteen years.

Q. And have you held licenses issued by the United States Coast Guard as a deck officer?

A. Yes.

Q. Would you tell the Court briefly what those licenses were?

A. Third mate, second mate and chief mate.

Q. In 1955 were you second officer on board the

(Testimony of Norman Lewis Tomlin.)

SS Oregon Mail? A. Yes.

Q. And were you second officer on Voyage 33 commencing at the port of Portland, Oregon, about August 13, 1955? A. Yes.

Q. Were you present on board the vessel at the port of Vancouver, Washington, when barley was loaded to the vessel approximately August 18, 1955?

A. Yes.

Q. In which hold was that cargo loaded?

The Court: If you know. He has not said that he knew or anything about that in his former answers.

Q. (By Mr. Crutcher): Did you personally know what cargo activities were going on aboard the vessel while it was at Vancouver, Washington?

A. Yes. [18]

Q. In that connection what generally are the duties of the deck officer, or I should say the second officer, while a vessel is in port loading cargo?

A. In general to assist the chief officer in the cargo loading and follow his instructions as to special cargo and loading conditions.

Q. Did you receive any instructions at that port while that cargo was being loaded concerning fuses in the lights to the number one hold? A. Yes.

Q. Would you tell the Court what those instructions were?

A. To remove the fuses due to the grain, or whatever you call it, grain cargo, barley, being loaded in number one lower hold.

Q. Which fuses are those, Mr. Tomlin?

(Testimony of Norman Lewis Tomlin.)

A. To the lights in the lower hold.

Q. Now, can you state what the practice is aboard American Mail Line vessels with respect to the removal of fuses?

A. Well, when wheat or grain cargo is loaded of any type we remove the fuses to eliminate the fire hazard.

Q. Well, how does that eliminate fire hazard?

A. By having someone on board that could possibly turn the switches on, the lights, and the lights would be right against the cargo and cause enough heat to start a fire.

Q. And what does the removal of the fuses accomplish? [19]

A. It eliminates the chance of anyone turning the switches on. They can still turn the switches on but they can't—there will be no juice going to the hatch.

Q. Can you state whether you know of the general practice in the American merchant marine in this respect?

A. The general practice is to remove the fuses as we did.

Q. Has that practice prevailed as long as you have been in the merchant marine? A. Yes.

Q. Incidentally, how long have you worked for American Mail Line? A. Since 1943.

Q. In the course of that have you had occasion to carry other grain cargoes? A. Yes.

Q. Is that a regular trade of American Mail Line? A. Yes, it is.

(Testimony of Norman Lewis Tomlin.)

Q. Were you on board the SS Oregon Mail on the 20th of August, 1955? A. Yes.

Q. Where was the vessel at that time?

A. Oh, I'd have to refresh my memory on that.

Q. Could you do so by referring to the rough deck log book? A. Yes. [20]

* * *

(A log book was marked Respondent's Exhibit No. A-1 for identification.)

Q. (By Mr. Crutcher): Mr. Tomlin, the bailiff is handing you a book which purports to be a log book for the SS Oregon Mail which has been marked for identification as Respondent's Exhibit A-1. Will you please tell the Court what that book is?

A. That's the rough log of the Oregon Mail for Voyage 33.

Q. Can you personally identify it of your own knowledge? A. Yes.

Q. And is that a book which is kept in the regular course of the ship's business?

A. Yes. [21]

* * *

Q. (By Mr. Crutcher): And will you tell the Court where the vessel was on the 20th of August, 1955? A. At what time is that?

Q. Well, just during that day.

A. Yes, that was Vancouver.

Q. Was that Vancouver, British Columbia?

(Testimony of Norman Lewis Tomlin.)

A. Yes.

Q. Now, during the course of that day did you have occasion to look at the smoke detector in the pilot house? A. Yes.

Q. Will you tell the Court what you observed?

A. A slight—

Q. Or excuse me, I'll withdraw that question. First of all, about what time was that, Mr. Tomlin?

A. That was at 1800.

Q. Would that be 6:00 o'clock in the evening?

A. 6:00 p.m., yes.

The Court: I would like to know what year that August 20th was.

A. 1955.

The Court: You may inquire.

Q. (By Mr. Crutcher): Now will you tell the Court what you observed on that occasion?

A. Slight smoke coming from the smoke detector in the [22] bridge, wheelhouse.

Q. Now, was that coming from a particular unit within the smoke detector system? A. Yes.

Q. Which unit was it?

A. The Rich audio fire detecting system.

Q. Well, did it indicate smoke coming from a particular area on the vessel? A. Yes.

Q. Which area was that?

A. Number one lower hold.

Q. What did you do after you noticed this phenomenon in the smoke detector cabinet?

A. I notified the chief mate and captain.

Q. Who was the chief mate?

(Testimony of Norman Lewis Tomlin.)

A. That was Rodney Palmer.

Q. And who was the master?

A. Captain Wilmarth.

Q. What did you do thereafter with respect to this sign of smoke?

A. The chief mate and I made a tour through the ship, inspection of all the hatches and all the escapes.

Q. What time was that?

A. That was just after that.

Q. Did you locate any sign of fire or place of origin of [23] the smoke?

A. Not definitely at the time.

Q. Did you take any further action to determine which hatch the smoke was coming from?

A. Well, the smoke was coming from number one by visible means on the smoke detector.

Q. And did you take any precautions at the number one hatch?

A. Well, we shut the dampers on the ventilation system.

The Court: Where?

A. They're on the king post.

The Court: Respecting what hatch, if any?

A. On number one hatch.

The Court: What did you call those, dampers?

A. Fire dampers.

Q. (By Mr. Crutcher): Are those installed on the king post? A. Yes.

Q. Where are the controls for those?

A. On the king post.

(Testimony of Norman Lewis Tomlin.)

Q. Was there any change in the condition aboard the Oregon Mail with respect to this smoke condition during the remainder of that night? That is, I'm referring now to August 20, 1955.

A. A slight change, increase in the smoke.

Q. Was any watch maintained on the smoke detector unit? A. Yes. [24]

Q. How frequently was the smoke detector unit observed? A. About hourly.

Q. Now, I believe the 21st, the following day, was a Sunday, was it not? A. Yes.

Q. The vessel arrived here in Seattle at Fisher's Dock? A. Yes.

Q. Were you aboard during the 20th?

A. During the morning.

Q. Up to what hour?

A. Till we were tied up at Fisher's.

Q. Can you tell the Court about what time that was, approximately?

A. I'd have to refresh my memory again.

Q. Can you do so?

A. Yes (referring to log book). That was 0800.

Q. That would be 8:00 o'clock a.m.?

A. Yes.

Q. By our laymen's standard of time. Well, up to that time had you taken any further action with respect to this sign of smoke?

A. Yes, we made an inspection about number one to see if we could find the fire, and we still couldn't find any—

Q. Was there any—

(Testimony of Norman Lewis Tomlin.)

Mr. Detels: If the Court please, may I [25] move that the last answer be stricken for the reason that the witness has assumed the existence of a fire without having stated any—

The Court: Did he say he assumed it?

Mr. Detels: Well, may the answer be read?

The Court: Yes, the last answer will be read.

Mr. Crutcher: Will you read the question also, Mr. Reporter?

The Court: That will also be done.

(The reporter read back the question and answer as follows:

“Q. Well, up to that time had you taken any further action with respect to this sign of smoke?

“A. Yes, we made an inspection about number one to see if we could find the fire, and we still couldn’t find any—”)

The Court: The objections are overruled and denied.

Q. (By Mr. Crutcher): Now, did you attempt to determine whether smoke was coming from the king post at the time? A. Yes.

Q. I’m referring now, of course, to the king post at number one hold. Would you tell the Court how many posts there [26] are there?

A. There’s two abreast of each other between number one and two hatches.

Q. Is number one hold the farthest forward in the vessel? A. Yes.

Q. How high do those posts go, just roughly?

A. Seventy feet, I would say.

(Testimony of Norman Lewis Tomlin.)

Q. I believe you indicated, Mr. Tomlin, that you then left the vessel at about eight o'clock on Sunday morning, August 21st. Is that correct?

A. Eight or nine by the time I left.

Q. Now, thereafter did you return to the vessel either that night or the following day?

A. I'll have to refresh my memory with the log book. (Witness refers to log book.) That would be Monday. Yes.

Q. Was that August 22, 1955? A. Yes.

Q. What was your duty during that day?

A. The same as I stated before, just general supervision of cargo and checking times of starting, stopping.

Q. And will you state to the Court whether they commenced discharging cargo from number one hold on that day?

(Witness refers to log book.)

A. Yes, I think they did. Yes, they did.

Q. Did you look at the smoke detector cabinet that day? [27] A. Yes.

Q. Will you describe to the Court what the appearance of the smoke or whatever it was emanating from the detector was on that day?

A. Just smoke coming out of the detector. It was thicker than it had been.

Q. Was there any smoke observed from the king post? A. Yes.

Q. Were the vents opened for the purpose of observing that smoke? A. Yes, they were.

Q. Can you describe to the Court the color of

(Testimony of Norman Lewis Tomlin.)

the smoke and the density as it appeared to you at that time?

A. Oh, I would say a brownish color, fairly thick at that time.

Q. Was this the smoke coming from the king post at that time?

A. And through the smoke detector.

Q. Was smoke coming from any other part of the vessel so far as you could observe at that time?

A. Only from the king post and the smoke detector.

Q. Was the vent on the king post left open continuously at that time, that is, on Monday?

A. No, closed, only to check for the visible smoke.

Q. You mean it was opened only to check for the visible smoke? [28] A. Yes.

Q. Now, thereafter did you observe damaged barley being removed from number one lower hold?

A. Yes.

Q. About what date was that?

A. Let's see (referring to log book). On the 23rd.

Q. Can you describe to the Court the general appearance of that damaged barley?

The Court: What happened on the 23rd? I did not quite—

A. Just a moment, that was wrong. That was the 24th.

The Court: What happened on the 24th?

A. That's when they started discharging.

The Court: Did you make any report of any

(Testimony of Norman Lewis Tomlin.)
condition in the hold that had anything to do with inspiring or starting that discharging?

A. Yes.

The Court: What was that and when did you make it?

A. That was 1800 on the—

The Court: Give the date and the time of day. I am not familiar with that method of reckoning time.

A. Yes.

The Court: It is cumbersome also. [29]

A. That was at 6:00 p.m. on August 20th.

The Court: So on August the 20th at 6:00 p.m. for the first time you discovered the fire, is that right?

A. Yes, I discovered the smoke.

The Court: I want to know when you discovered the fire, if you did discover it.

A. No.

The Court: Who did, if you know?

A. I think the Seattle Fire Department.

The Court: Did you ever discover the place where the smoke was coming from before the discharge of cargo was commenced?

A. Only by the aid of the smoke detector.

The Court: Did you determine where the smoke was coming from with respect to a local point or spot in the ship?

A. Yes.

The Court: When did you make that determination?

A. At 6:00 p.m.

(Testimony of Norman Lewis Tomlin.)

The Court: What date?

A. On the same date there I just gave.

The Court: The 20th?

A. Yes.

The Court: 6:00 p.m., August 20th?

A. Yes. [30]

The Court: And where was that spot?

A. That was number one lower hold.

The Court: You may inquire.

Q. (By Mr. Crutcher): Now, Mr. Tomlin, adverting now to the time when they commenced removing damaged barley from number one lower hold after they had dug down through the good barley in number one lower 'tween deck, will you describe to the Court the condition or appearance of that barley as you observed it at that time?

A. It was black and caked, stuck together.

Q. Was there any evidence of heat in that char?

A. Yes, there was—not at that time, the heat was gone then.

Q. Would you please state what date that was?

A. That was on the 25th.

The Court: Where was the ship when the discharging was begun?

A. At Pier 88.

The Court: What city?

A. Seattle, Washington.

The Court: You may inquire.

Q. (By Mr. Crutcher): Now, what if anything did you have to do personally with the discharge of that cargo, Mr. Tomlin?

(Testimony of Norman Lewis Tomlin.)

A. Just to, like I say, generally supervise, just get the [31] times that they started, stopped, and the gangs that were in the hatch. Myself and the other officers are all supposed to do that.

Q. Now, were you present at the time that they completed discharging the damaged barley?

* * *

A. Yes.

Q. (By Mr. Crutcher): What day was that?

A. That was the 26th of August.

Q. Now, at that time did you go down into the hold, Mr. Tomlin? A. Yes.

Q. First of all I might ask, was there any smoke issuing from the hold at that time? A. No.

Q. In the meantime had carbon dioxide been applied to this cargo? A. Yes. [32]

Q. Now, did you go down into number one lower hold at that time, that is, on the 26th?

A. Yes.

Q. Was this during daylight hours?

A. Yes, it was.

Q. And were the hatches open at that time?

A. Yes.

Q. And did you have any other means of illuminating the area? A. A flashlight.

Q. And did you make an examination of the number one lower hold at that time? A. Yes.

Q. Would you tell the Court first of all in what general area this burning had taken place, if you can?

(Testimony of Norman Lewis Tomlin.)

A. About the lights in the hatch, the illumination lights.

Q. And was that fore or aft of the square of the hatch? A. Aft of the square.

Q. Was it on the port or starboard side?

A. On both sides, but mostly on the port side.

Q. Now, I would like to ask you now to describe in a little more detail the condition of these light fixtures, and I ask you first the condition of the light fixture on the port side aft?

A. It was blackened and caked with barley, blackened barley.

Q. What was the appearance of the pyrex glass covering? [33]

A. It was—it had a blackened film over it, too.

Q. What was the condition of the cable adjacent to this lamp?

A. It was hardened and blackened, too, and very brittle.

Q. Now, can you compare the appearance of the lamp on the port side aft of the square of the hatch?

A. Well, that's the one I'm talking about now.

Q. I beg your pardon. I meant the starboard side.

A. On the starboard side it was blackened, but not quite as bad as the port side.

Q. Did you observe the condition of the cable in that area also? A. Roughly, yes.

Q. And will you tell the Court what the appearance was there?

A. It was in about the same condition, stiff and blackened.

(Testimony of Norman Lewis Tomlin.)

Q. Now, can you describe the appearance of the overhead, that is, the undersides of the lower 'tween deck aft of the hatch coaming?

A. Yes. It was blackened and had blackened kernels of barley stuck to the overhead.

Q. And what was the condition of the paint on the overhead?

A. It was blackened and charred.

Q. Did you see any signs of the paint having burned? A. Not exactly, no.

Q. Why is that?

A. Because there's only about one or two coats of paint there [34] and it's very thin and it's hard to blister real thin coats. It's sprayed.

Q. Perhaps you misunderstood me. I wasn't asking you about blistering, but about burning.

A. Well, burned, it was burned.

Q. How far aft of the hatch coaming did this condition extend?

A. Mostly around the lights on the port and starboard sides.

Q. Can you estimate about how far aft it went?

A. Well, the blackened condition was about four or five feet aft, but then it was still dark or smoke colored or discolored clear back to the after end of the hatch.

Q. And about how far towards the center of the hatch from the lights did this area extend? I should ask separately first the port side, the port light.

A. Oh, I would say about five feet or so.

The Court: What kind of substance did you say was used to stop that fire?

(Testimony of Norman Lewis Tomlin.)

A. CO₂.

The Court: What do you call it? You had another name for it.

A. Carbon dioxide.

The Court: You may inquire.

Q. (By Mr. Crutcher): Now, can you describe the approximate dimension of the burned area on the starboard side? [35]

A. About four feet by five feet around the light, centered around the light.

Q. Are you able at this time to describe in detail the various conditions which you observed in and about the lights, the cable and the overhead at that time? A. Not too well.

Q. Did you form an opinion at that time as to whether or not there had been a fire in that area?

A. Yes.

Q. I refer now to the area adjacent to the light in the after port corner of what I believe is commonly referred to as the trunk, that is the lamp you've been describing, first. A. Yes.

Q. And will you state what that opinion was?

* * *

Mr. Detels: May I inquire on voir dire, your Honor?

The Court: You may.

Mr. Detels: Mr. Tomlin, have you had any particular educational background in the field of physics?

A. No.

(Testimony of Norman Lewis Tomlin.)

Mr. Detels: Have you had any particular [36] educational background in the field of chemistry?

A. No.

Mr. Detels: If the Court please, I submit that the question calls for an opinion and conclusion of the witness upon a subject which is a matter for expert testimony and that it has not been shown that the witness has any qualifications to testify as an expert on that matter.

The Court: I am not satisfied on the proof shown up to this time. You may inquire further concerning the qualifications if you wish to do so.

Mr. Crutcher: May it please the Court, I'm not offering this opinion as the opinion of an expert, I'm offering this opinion as the opinion of a lay witness, that is a witness without any particular technical qualifications, who was there and saw the conditions and is not able to fully and accurately convey all of the things which entered into his judgment in words. This is a well recognized exception to the general rule.

The Court: Refer to some authoritative statement of such well recognized exception.

Mr. Crutcher: Yes, your Honor. I refer to Volume 7 of Wigmore on Evidence, Third Edition, dealing with the opinion rule.

The Court: Volume what? [37]

Mr. Crutcher: Volume 7 of Wigmore on Evidence, Third Edition.

The Court: What page?

Mr. Crutcher: The several sections commencing with Section 1921. [38]

(Testimony of Norman Lewis Tomlin.)

* * *

Q. (By Mr. Crutcher): First of all I will ask you, Mr. Tomlin, whether you took the cable in your hands on that occasion at any point? A. Yes.

Q. Would you tell the Court what you did?

A. I pulled on it.

The Court: What cable?

A. The electrical cable for the lights.

Q. (By Mr. Crutcher): Now, is this the light in the after port corner of number one lower hold?

A. Yes.

Q. In the same area that you previously have been mentioning? A. Yes.

Q. Would you describe to the Court the condition of the cable that you observed when you pulled on it?

A. It was blackened and stiff and charred.

Q. And what happened when you bent it?

A. The insulation cracked.

Q. Now, I will rephrase the question which preceded my [40] question asking you for an opinion. I am referring now to the area just aft of the hatch coaming of number one lower hold in the vicinity of the lamp which you previously described in that corner, and will ask you whether you formed an opinion as to whether there had been a fire in the immediate area of that lamp? A. Yes.

Q. On the basis of your examination on the day of August 26, 1955? A. Yes. [41]

* * *

(Testimony of Norman Lewis Tomlin.)

Q. (By Mr. Crutcher): Mr. Tomlin, I'll ask you at this point, had you ever previously to this time, August of 1955, observed the effect of fire on an electrical cable similar to that installed in the lower hold of the Oregon Mail for this particular lamp we've been talking about aft of the hatch coaming? A. Yes.

Q. And would you tell the Court what the effect of fire on a cable such as that is?

A. It bakes the insulation, burns the wiring inside or bakes it and takes your strength out of your electrical wiring, plus the armored cable on the outside, it will take the tension out of it, the tensile strength of the cable.

Q. And does this have a distinctive appearance as distinguished from cable in ordinary condition?

A. It all depends on the fire, what type of fire.

Q. Well, what I'm asking is—

A. And the heat.

Q. What I'm asking is, does the condition of a burned armored electrical cable such as was in this hold differ so far as appearance and feel are concerned from the same cable in ordinary condition?

A. Yes.

Q. And are you able from your experience to distinguish the [42] difference between the two?

A. Yes.

Q. Now, confining my question to the condition of the cable, are you able to express an opinion based upon your examination of the cable in the vicinity of this particular light to which we have

(Testimony of Norman Lewis Tomlin.)

been referring, that is aft of the hatch coaming on the port side, are you able to or were you able at the time of your examination on August 26, 1955, to form a conclusion as to whether that cable had been burned? A. Yes. [43]

* * *

Q. (By Mr. Crutcher): Will you describe the condition of the cable as you observed it on the occasion to which we have just referred, first with reference to the armor or sheathing on the outside of the cable?

A. That was blackened and the inside insulation was baked and hardened, and when I pulled it, it cracked.

Q. What is inside that black sheathing?

A. Some of it has plastic and some has a hard rubber. Then your wires are inside that, but you have a canvas on most of that type wiring inside that before you get to the wires.

Q. Now, what did you observe when you pulled on the wire?

A. That it cracked, the insulation cracked.

Q. Could you see whether or not it was baked?

A. Yes.

* * *

Q. (By Mr. Crutcher): What did you observe?

A. The inside of the cable cracked and cracked any place [44] where it was bent by hand, it would crack around the wire.

(Testimony of Norman Lewis Tomlin.)

Q. Now, had you observed a similar condition previously in other similar cable in your experience? A. Yes.

Q. And what had been done to that previous cable? A. It had to be replaced.

Q. Well, I mean what gave rise to the condition in the other cable that you previously saw?

A. A fire.

Q. Was the cable itself immersed in the fire?

A. Yes.

Q. Did the cable or the insulation have a distinctive feel in your hand? A. Yes.

Q. Was that different than the feel of ordinary cable?

A. It's entirely different from good wire, wire that hasn't been in a fire.

Q. Can you explain to the Court what the sensation is of taking hold of a piece of cable that has been burned?

A. It's softer and it will—any movement will—it will crackle and your insulation cracks.

Q. Now, referring to this particular cable in the vicinity of the after port light of the number one lower hold which you have previously mentioned in your testimony, was there any difference between that cable and this cable [45] you have just described? A. Not much.

Q. On the basis of that observation and that feeling of the cable did you arrive at a conclusion or opinion as to the condition which had resulted in the damage to the cable? A. Yes.

(Testimony of Norman Lewis Tomlin.)

Q. Will you state what that opinion or conclusion was? [46]

* * *

A. That there had been a fire around the lights in the hatch.

* * *

Cross-Examination

By Mr. Detels:

Q. Mr. Tomlin, in your direct testimony I'm not sure I understood whether with reference to the date of August 18th you testified that you were instructed by someone to pull the fuses or you instructed some other person to pull the fuses.

A. No, I instructed—I was instructed myself and the third [47] or fourth mate to instruct the electrician, chief electrician, to pull the fuses.

Mr. Detels: I move to strike that answer as not responsive.

* * *

The Court: The objection is overruled and the motion is denied.

Q. (By Mr. Detels): Did you instruct yourself anyone to pull the fuses for the cargo lights in the number one hold? A. No.

Q. Now, with reference to the practice on American Mail Line vessels with respect to fuses in grain hatches, is it the practice to pull all the fuses in any hatch in which grain [48] has been loaded, including fuses in compartments which are not loaded with grain?

(Testimony of Norman Lewis Tomlin.)

A. No. It's only in the compartments with wheat or grain cargo.

Q. So that if on a particular occasion grain is loaded in the number one lower hold and number one lower 'tween deck only, it would not be the practice to remove the fuses for the cargo lights in the number one upper 'tween deck?

A. Yes, we would usually. That's the usual practice, but on the fuse box there's lights for the king post lights and outside lights, too, so you can't remove them all.

Q. Well, I am afraid I misunderstood you. If cargo of grain is loaded in the lower hold but not in the 'tween decks, is it the practice on American Mail Line vessels to remove the fuses for the cargo lights in the 'tween deck compartments?

A. No, we wouldn't except if it was—as long as it's in the lower hold, but if you come into the 'tween deck with the cargo we would remove the fuses.

Q. Well, now, if the cargo is loaded in the lower hold and in addition in the lower 'tween deck, is it the general practice on American Mail Line vessels to remove the fuses for the cargo lights in the upper 'tween deck?

A. We would probably leave them in. [49]

Q. Well, is that the general practice to leave them in? A. On this ship it is.

Q. Well, on August 18th were you instructed to remove all the fuses for the cargo lights in the num-

(Testimony of Norman Lewis Tomlin.)

ber one hatch or only the fuses for the cargo lights in the compartments containing barley?

A. Just the compartments with the barley.

Q. Were you present when the third officer issued instructions to the electrician? A. No.

Q. Did you at any time after August 18th and until you made this discovery of smoke at Vancouver, B. C., on August 20th enter the number one resistor house? A. Yes.

Q. Now, I'm referring now to prior to your observation of smoke at Vancouver on August 20th.

A. Yes.

Q. Did you observe the switches in the distribution panel controlling the number one hold?

A. Yes.

Q. Did you observe the position of the switches?

A. No.

Q. Did you observe the fuses?

A. No. There's a double door, you can't see the fuses.

Q. You did not open the door? [50]

A. Just the single door is the only one you open for turning on lights.

Q. Did you enter that resistor house for the purpose of turning on lights? A. Yes.

Q. Where was that? A. What port?

Q. Yes.

A. Oh, every port, practically. I turn on the lights all the time.

Q. Well, I'm referring now to the specific period beginning with the time you were instructed to remove the fuses for the lights in the number one

(Testimony of Norman Lewis Tomlin.)

hold and ending with the time at which you observed smoke in the smoke detector cabinet on the evening of August 20th. A. Yes.

Q. And I'm asking you if you turned on the switches in the number one resistor house at any time during that period.

A. For the deck lights.

Q. And when would that have been, and if it will assist you to refer to the rough deck log, please do so.

A. Well, it would be—(referring to log book)—that would be on August 18th.

Q. And would you be able to state the time of day?

A. Oh, I would say seven—oh, sixteen, or 4:45 p.m. [51]

Q. You would turn on the deck lights prior to 5:00 o'clock in the afternoon of a day in August?

A. Yes.

Q. Did you observe the position of the switch controlling the hold lights in the number one lower hold at the time you turned on the deck lights on the evening of August 18th?

A. I wouldn't pay any attention to them when I turned the deck lights on. There's just a standard switch arrangement for your deck lights. [52]

* * *

The Court: The objection is sustained.

Q. (By Mr. Detels): On the evening of August 20th at Vancouver, B. C., after you reported that

(Testimony of Norman Lewis Tomlin.)

you had observed smoke in the smoke detector cabinet to the chief mate and the master, did they make an observation of the smoke detector cabinet in your presence? A. Yes.

Q. Was smoke visible at that time?

A. Yes.

Q. Directing your attention to a log entry in the rough log, Respondent's Exhibit A-1, for August 20, 1955, on the left-hand page bearing the time 1800, will you read that, please?

A. Yes. (Reading):

"1800. Second mate informed master and chief mate of a suspicious odor coming from the smoke detector. Checked same and no visible signs of smoke showing. Chief mate and second mate checked all cargo spaces except number one lower hold which is plugged with grain. Nothing unusual found. Robert—"

Well, "R. P." are the initials. Rodney Palmer.

Q. Now, is that entry in error insofar as it states that no smoke was visible? [53]

A. That's not my entry.

Q. Well, I appreciate that, but in fact there was visible smoke at the smoke detector cabinet at the time to which this entry refers, was there not?

A. Yes, in my opinion.

Q. Were you present at the time this entry was made in the rough deck log?

A. I don't remember.

Q. Do you know when it was made?

A. At that same time, after we inspected the cargo holds.

(Testimony of Norman Lewis Tomlin.)

Q. Well, directing your attention to the immediately preceding entry bearing the time 2200—

A. Yes.

Q. Would it not be the normal procedure for the entries to be made in chronological order and would it not indicate that the 1800 entry was made after the 2200 entry?

A. No. It could be made any time. It would take us almost that long to go through all the spaces.

Q. Were you aboard at Seattle the following morning, August 21st, when Captain Greenwood, the Port Captain of American Mail Line, came aboard the vessel? A. Yes.

Q. You were aboard at that time?

A. Yes, I'm pretty sure I was.

Q. Did you have any conversation with [54] him? A. I don't remember.

Q. Do you recall whether or not he asked you any questions concerning your observations of the preceding evening?

A. No, I don't remember that.

Q. Did you enter the number one resistor house on the evening of August 20th?

(Witness refers to log book.)

A. Let's see. I would say no, I don't think so.

Q. Did you make any investigation at any time to determine whether the lights had been left on in the cargo of barley loaded into the number one lower hold? A. Not that I remember.

The Court: In what condition did you find the

(Testimony of Norman Lewis Tomlin.)

fuses, if you examined the fuses, after you discovered the smoke?

A. I didn't examine the fuses that I remember of.

The Court: You do not know whether they were then burned out or not?

A. No.

The Court: What time of the day was it when you first saw what you thought was smoke coming from the hold?

A. At 6:00 p.m.

The Court: On the 20th? [55]

A. On the 20th of August, yes.

The Court: You may proceed.

Q. (By Mr. Detels): Referring now to August 22nd when the vessel was at Seattle, during what hours were you on duty aboard the ship?

A. Till we docked at Fisher's Mill.

The Court: How many days or how many hours was that?

Mr. Detels: If the Court please, I believe the witness is confused as to the date, and—

The Court: That is one reason the Court asked the question.

A. Oh, on the 22nd. I misunderstood that.

Mr. Detels: Yes.

A. That was—let's see (referring to log book). Let's see, I wasn't—I think I had that day off.

Q. (By Mr. Detels): You were not aboard the vessel on August 22nd?

A. I don't think so, to the best of my memory.

(Testimony of Norman Lewis Tomlin.)

Q. Well, I understood your previous testimony to be that the discharge of cargo from the number one hold had been commenced on that day.

A. Yes.

Q. You have no personal knowledge of that then, do you?

A. Not personal, but just by the log book. [56]

* * *

Mr. Detels: If the Court please, this is the only witness that I believe we will have this problem with. The witness' vessel sails this evening. We will wish to put in a case in rebuttal, and rather than take steps to delay the witness or prevent him from sailing at all I would like to examine him as my witness as a part of my rebuttal case. [60]

The Court: Is there any objection to that?

Mr. Crutcher: None, your Honor.

The Court: You may do so if you can get through right away. Do you wish these questions and answers that were objected to considered in that connection?

Mr. Detels: Yes, I do, your Honor.

The Court: Do you know which one initiates that phase of your examination? If so, state which one, so the reporter can identify it.

* * *

(The reporter read back as follows:

"Q. (By Mr. Detels): Mr. Tomlin, the smoke detector cabinet to which you previously referred is equipped with an audible alarm system, is it not?"

(Testimony of Norman Lewis Tomlin.)

"A. Yes.

"Q. And that is a buzzer? A. A bell.

"Q. A bell? [61] A. Yes.

"Q. Now, did that bell sound at any time aboard the vessel during the period August 18th to August 26th to your knowledge?

"A. Not to my knowledge.

"Q. Will you explain how that bell is activated?

"A. The smoke, if there is a fire, comes up into the cabinet, goes past a photoelectric cell, and when it gets dense enough it sets off the alarm.

"Q. Is that system tested from time to time?

"A. Yes. At that time, yearly.

"Q. And what is the manner of testing it to determine that the buzzer is in operating condition?

"A. Well, there's two different methods that I've experienced. One is by a cigarette with a long stick to reach up into the overhead and a little bellows makes it smoke bad, and then an envelope full of chemical, and you light the end of the chemical and it [62] throws a heavy smoke out, and it's checked in the wheelhouse and by one of the officers of the ship and usually Alexander Gow here in Seattle or Portland.

"Q. In your experience has the bell on the Oregon Mail smoke detector cabinet been activated by a cigarette attached to this bellows apparatus that you referred to? A. Yes." [63]

* * *

Q. (By Mr. Detels): Do you recognize the electrical panel which appears in Libelant's Exhibit 1?

(Testimony of Norman Lewis Tomlin.)

A. Yes.

Q. Can you state what panel that is?

A. That would be in any of the hatches, but this is probably the one in number one resistor house. The three of them are identical.

Mr. Detels: I will offer Libelant's Exhibit 1.

Mr. Crutcher: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 1 for identification was admitted in evidence.)

Q. (By Mr. Detels): Directing your attention to the paint markings appearing around and adjacent to the switches in that photograph, can you state whether or not those paint markings were in existence during the period August 17th to 20th, 1955? A. I don't recall. [64]

* * *

RICHARD C. WILMARTH

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name and spell your last name, Captain?

A. Richard C. Wilmarth, W-i-l-m-a-r-t-h.

The Court: W. C.?

A. R. C.

(Testimony of Richard C. Wilmarth.)

Q. (By Mr. Crutcher): Where do you live, Captain? A. Hoquiam, Washington.

Q. Do you have some difficulty with your hearing, Captain? A. Yes, sir.

Q. Can you hear my questions fully from here?

A. Yes, I do now.

The Court: Captain, you ask Counsel and anyone else to repeat if you do not clearly understand, will you do that?

A. Yes, sir.

The Court: Feel free to do that.

A. All right, sir.

The Court: Rather than to take a chance on making an irresponsible answer.

Q. (By Mr. Crutcher): What is your occupation? [75] A. Ship's officer.

Q. And how long have you been in the merchant marine? A. Thirty years.

Q. When did you start and in what capacity?

A. I started as a seaman in 1926.

Q. And have you been in the American merchant marine continuously since that time?

A. Yes, except for short periods.

Q. When did you get your first deck officer's license? A. April, 1934.

Q. And have you held a license from the United States Coast Guard since that time as a deck officer? A. Yes.

Q. What licenses do you presently hold?

A. Master.

Q. Is that an unlimited ocean master?

A. Sir?

(Testimony of Richard C. Wilmarth.)

Q. I beg your pardon. I'll rephrase that question. Is that a master's license, unlimited ocean?

A. Yes.

Q. And is that issued by the United States Coast Guard? A. Yes.

Q. In what trades have you served generally?

A. Mostly in the Oriental trade, to the Far East, but quite a bit of coastwise work, too. [76]

Q. In the course of that trade have you been on vessels carrying grain? A. Yes.

Q. On many occasions?

A. Oh, at least ten.

Q. Captain, when did you go to work for American Mail Line? A. In August of 1942.

Q. About how many of their vessels have you served on? A. Ten.

Q. And how long did you continue your employment with American Mail Line?

A. Fourteen years.

Q. Were you on duty on the SS Oregon Mail in August of 1955, that is for what is called Voyage 33 of the SS Oregon Mail?

A. Yes. I was master at that time.

Q. Now, do you recall where and when you went aboard the ship to commence that service on that occasion? A. April the 9th in Seattle.

Q. Would that be August 9th, Captain?

A. Or August, excuse me. I beg your pardon.

Q. And thereafter were you continuously aboard or in command as master during that voyage?

A. Yes.

Q. Did you have any duties to perform person-

(Testimony of Richard C. Wilmarth.)

ally with [77] respect to the loading of a cargo of barley at Vancouver, Washington?

A. Not exactly personally. The chief officer was in charge of loading. Of course I'm responsible, but he was directly in charge of it.

Q. Did you have any personal knowledge of conditions aboard in the cargo holds at that time?

A. Only that the holds were reported ready for cargo and cleaned and ready for cargo.

Q. Now, did you have anything to do with the loading of cargo at Longview, Washington?

A. Well, the same thing, I was in charge but the mate was actually doing the work.

Q. Is that a customary allocation of duty?

A. That's usual.

Q. Do you recall a report received by you on the evening of August 20, 1955, concerning smoke or an odor from the smoke detector cabinet in the pilothouse of the Oregon Mail? A. Yes.

Q. Would you tell the Court what was reported to you at that time?

A. Well, one of the watch officers, I don't remember which, reported this odor from the smoke detector exhaust, and we all smelled it but we couldn't identify it as smoke [78] or anything. We just didn't know what it was, but we—

Q. Can you tell the Court as best you can just what it was that you did detect at that time?

A. Well, the smoke detector system shows the—it's supposed to call an alarm. However, there's an exhaust pipe that can be opened and closed. We

(Testimony of Richard C. Wilmarth.)

opened the opening on that and smelled the exhaust coming out much more than we would from the inside of the cabinet, and the odor was there.

The Court: That watch officer notified you of the odor that was shown on the smoke detector, is that what you call it?

A. Yes, sir.

The Court: Smoke detector?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Crutcher): Captain, what action did you take at that time, if any, concerning this condition?

A. I instructed a close watch be kept on the smoke detector apparatus for further developments.

Q. And did anything further occur that night which was called to your attention?

A. Not that I remember.

Q. Now, I believe the vessel then proceeded on that night to Seattle, did it not? [79]

A. What was that again, please?

Q. I say the vessel proceeded on to Seattle, did it not, on that night? A. Yes, sir.

Q. And the next morning you were at Fisher's in Seattle?

A. The next morning we tied up at Fisher's, yes.

Q. And were you on board at that time?

A. Yes.

Q. What action, if any, was taken at that time with respect to this condition which had been observed in the smoke detector?

(Testimony of Richard C. Wilmarth.)

A. Well, the odor was more pronounced, and one of the mates reported that he thought he saw smoke coming out of the port louver, the exhaust in the head of the king post on the port side, number one gear.

Q. Now, Captain, where is that king post located with reference to the foredeck on the ship?

A. On the port side in the after end of number one hold, that is at the resistor house at number one.

Q. Now, were you able to see smoke yourself at that time? A. I did not actually see it.

Q. Did you call for any assistance from American Mail Line personnel in Seattle at that time?

A. Yes, then I called Captain Greenwood.

Q. And were there some surveyors also on board that day? [80]

A. There were cargo surveyors aboard, yes.

The Court: I would like you to tell the Court again what you first did about this smoke report. What was the first thing you did about it? Just tell everything that you did about it.

A. That was on Monday morning coming down?

The Court: You spoke of the watch officer having told you, the first you ever heard of it, that the smoke detector indicated the presence of smoke somewhere in the ship.

A. Yes.

The Court: And then after that you said that you could smell something but you couldn't tell what the smell was, is that right?

(Testimony of Richard C. Wilmarth.)

A. Yes.

The Court: Then after that what did you do about it, if anything?

A. We—

The Court: What was the order of the events of your acting with respect to this smoke?

A. We sat a continuous watch on the smoke detector system, we kept it under surveillance at very frequent intervals.

The Court: You may proceed.

The Witness: And it was to be reported to [81] me if there was any significant change.

The Court: Proceed.

The Witness: Any visible signs of smoke or anything like that. At that time there hadn't been until we got to Fisher's Dock in Seattle that morning.

The Court: What morning?

A. Sunday morning, the 21st.

The Court: What month was that?

A. August.

The Court: And where was this Sunday morning arrival, at what dock, at what place?

A. Fisher's Flour Mill.

The Court: What was the date when that watchman made the report as to what the smoke screen or smoke detector showed?

A. Well, there was a more pronounced odor that morning.

The Court: I am talking about the first time he talked to you about it, the first time he spoke of it.

A. Oh.

(Testimony of Richard C. Wilmarth.)

The Court: What date was that?

A. That was the 20th.

The Court: Where was the ship then?

A. She was en route from Vancouver, B.C., to Seattle. [82]

The Court: What else did you do after the Fisher's Dock arrival?

A. Well, the officers and I tried to trace it down the best we could among ourselves and finally decided at nine o'clock to call Captain Greenwood.

The Court: Nine o'clock on that day, the 21st?

A. Yes, sir.

The Court: Was that a.m. or p.m.?

A. A.M.

The Court: What else did you do?

A. Well, I called Captain Greenwood and he in turn called several surveyors.

The Court: Who is Captain Greenwood?

A. He's Port Captain for the American Mail Line, and he called Mr. McGinitie, the surveyor, and the Alexander Gow people, the chemists, and all that.

The Court: What else did you do?

A. Well, we took hold temperatures.

The Court: Took what?

A. Temperatures of the hold by means of a thermometer down the bilge pipes, sounding pipes.

The Court: What else did you do?

A. And we made every effort to locate the exact position of what we thought would be a fire.

The Court: Next what did you do? [83]

(Testimony of Richard C. Wilmarth.)

A. Nothing that morning. We decided to wait awhile, I think, until developments, and we were to shift over to Pier 88 that afternoon anyhow.

The Court: In the afternoon what did you do?

A. We shifted to Pier 88, shifted the ship to Pier 88, which is the Americal Mail Line home dock.

The Court: What else did you do?

A. Kept a continuous watch on the smoke.

The Court: What else did you do?

A. And one officer and myself stayed on board all the time.

The Court: What else did you do?

A. Well, that's all for right now.

The Court: You may proceed.

Mr. Crutcher: Thank you, your Honor. I have requested the clerk to mark a photograph for identification as Respondent's Exhibit—

The Clerk: Respondent's Exhibit A-2.

(A photograph was marked Respondent's Exhibit A-2 for identification.)

Q. (By Mr. Crutcher): Captain, I ask you to examine this photograph and to state to the Court whether the forward king posts which appear in this photograph, that is the ones in the foreground of the photograph, are the king posts serving number one hold? [84]

A. That is right, the after end of number one.

Q. I'm sorry, I didn't catch that last.

A. The after end of number one.

Q. Now would you state which one in this photograph is the so-called port king post?

(Testimony of Richard C. Wilmarth.)

A. It's this one here on the—

Q. Would that be the one that's on the right of the photograph?

A. On the right of the picture as I'm looking at it, yes, sir.

Q. Does this fairly represent the structure of the king posts? A. Yes.

Q. As of August, 1955? A. Yes. [85]

* * *

Q. (By Mr. Crutcher): What I mean is, did the vessel's officers, including yourself, take any action on Monday concerning this condition which was developing in the [86] number one lower hold?

A. Well, we stopped all loading in number one and decided to discharge the hold.

* * *

Q. (By Mr. Crutcher): Did the vessel start discharging cargo from number one hold on that day?

A. Yes.

Q. And was that discharge continuous?

A. Yes.

Q. How long did it take to discharge the cargo above the barley in number one lower 'tween deck?

A. I don't recall, but probably the next day. I'll have to consult the log book. [87]

* * *

Mr. Crutcher: I ask that the bailiff show the witness the book which has previously been identified as Respondent's Exhibit A-1.

* * *

(Testimony of Richard C. Wilmarth.)

Q. (By Mr. Crutcher): Captain, I'm going to ask you a preliminary question about the book itself. Do you recognize your signature on those pages?

A. Yes.

Q. Is that your signature?

A. That is my signature. [88]

Q. And do you recognize this book?

A. Yes.

Q. Would you tell the Court what it is?

A. This is the bridge log kept by the ship's officers of the Oregon Mail on Voyage 33.

Q. Is that a contemporaneous record, I mean a record kept from time to time during the day as events occur? A. Yes.

Mr. Crutcher: Your Honor, I now offer Respondent's Exhibit A-1.

Mr. Detels: No objection.

The Court: It is admitted.

(Respondent's Exhibit No. A-1 for identification was admitted in evidence.)

Q. (By Mr. Crutcher): Captain, I'm inquiring now as to events on Monday, the day following the day that you arrived at Seattle and the first day you were at Pier 88. A. Yes.

Q. This is August 22nd, I believe.

A. Yes. [89]

* * *

Q. (By Mr. Crutcher): Who made the decision to effect that discharge?

(Testimony of Richard C. Wilmarth.)

A. I made it myself in conference with other officials of the company.

Q. Who were those other officials?

A. Captain Greenwood and Captain Swanson.

Q. Was any other action taken on that day with reference to the safety of the vessel?

A. Yes. We stopped discharging all—or stopped loading all loading operations about three o'clock or four o'clock that afternoon.

Q. Was there an exception in the case of reefer cargo?

A. Except some very perishable reefer cargo that had to be put aboard right away.

Q. Now, how long did it take to clear away the number one lower 'tween deck after you finished removing the cargo over the barley? Or, putting it another way, will you describe to the Court what was then done?

A. Well, we cleaned the 'tween deck, swept it up, the upper 'tween deck, and we called for a clam-shell and the proper transportation to discharge the barley until we could get down to the area. [91]

* * *

Q. (By Mr. Crutcher): Will you tell the Court what was done after you completed discharging the lumber on top of the [92] barley in number one lower 'tween deck?

A. Well, then we checked with the stevedore foreman and got all of the stevedores out of the hold, and we attempted with a length of black iron pipe to put some CO₂ into the area by poking it down through the grain.

(Testimony of Richard C. Wilmarth.)

Q. Was any covering laid over the barley before this was done?

A. Yes. We laid the pontoons down on top of the barley—no, wait a minute now. Not at that time, no.

Q. Thereafter during the early morning of the 24th was anything done to—

The Court: What all did you do on the 23rd, Captain, if you did anything on the 23rd besides finish the work of unloading those timbers? What else did you do on the 23rd?

A. Well, the night of the 23rd, why we rigged this—

The Court: What did you do during the day, the afternoon of the 23rd?

A. In the afternoon of the 23rd, well, we just continued discharging the timbers.

The Court: Very well. So you did not finish them on the morning of the 22nd, you finished them on the night of the 22nd, is that right, or on the morning of the 23rd? [93]

A. We finished the timbers the morning of the 23rd.

The Court: What else did you do on the 23rd, if you did anything, about this situation?

A. Well, the fire chief was aboard that evening, and then at 9:30 that night, why we rigged this portable CO₂ bottle.

The Court: You may proceed.

Q. (By Mr. Crutcher): Captain, I would like to know now, and I want to go back just one step

(Testimony of Richard C. Wilmarth.)

in our testimony, on Monday the 23rd, the day following your arrival at Seattle, was there any difference or change in the issuance of smoke from the vessel?

A. Yes, there was evidence of smoke that morning.

The Court: That is what day?

A. That was on the 23rd.

Q. (By Mr. Crutcher): Now, Captain, excuse me, I'm referring now to Monday the 22nd.

A. Monday the 22nd?

Q. Yes, sir. Did you observe smoke on that day yourself? A. Yes.

Q. And where did you observe that smoke?

A. We took it from the smoke detector then.

Q. Can you describe to the Court the color and density of the smoke? [94]

A. Well, it was very, very light and it was just a wisp of smoke. I don't exactly know the color of it. We also saw wisps of smoke if the sun was just right coming from the king post.

Q. Now, thereafter did the smoke change in volume or density? A. I don't recall that it did.

Q. Now, did you have the king post closed at that time? A. We closed the dampers off, yes.

Q. Is this the same king post which appears in the photograph which has previously been identified? A. Yes.

Q. Now, Captain, I want to go back now to the events on the 23rd. Did you complete your discharge on the 23rd?

(Testimony of Richard C. Wilmarth.)

The Court: What discharge?

Mr. Crutcher: The discharge of cargo—excuse me, your Honor.

Q. (By Mr. Crutcher): The discharge of cargo in the lower number one 'tween deck other than the barley?

The Court: Other than what?

Mr. Crutcher: Other than barley.

The Court: Do you mean the timbers he has spoken of?

Mr. Crutcher: Yes.

The Court: He has not spoken of discharging any cargo other than timber. [95]

A. Well, there was some other cargo in there.

The Court: What was it, of what nature?

A. Oh, some stuff called Gilsonite.

The Court: What else, if anything?

A. And—well, that's all we discharged.

The Court: You may proceed.

Q. (By Mr. Crutcher): Did you proceed as rapidly as you could, or was—I beg your pardon, that's not properly stated. Could the vessel have been discharged more quickly than it was?

A. No.

Q. Now can you tell the Court again, just to clarify the record on this, when it was that the lumber was finally completely discharged from number one lower 'tween deck.

A. When was it discharged?

Q. Yes, when you completed it. Just to get our time straight. A. On the 23rd at midnight.

(Testimony of Richard C. Wilmarth.)

Q. Are you now referring to the log book?

A. I am now, yes, sir.

Q. Now, after the lumber had been completely removed will you tell the Court what was done aboard the ship next?

A. Well, we cleaned the lower 'tween deck, the 'tween deck hold of all the trash and dunnage, and then we got this—

The Court: When did you do that?

A. Sir? [96]

The Court: When—

A. Right after the timber—that was early in the morning of the 24th, sir.

Q. (By Mr. Crutcher): At what time?

A. Well, it was at one o'clock when the gangs resumed work after their meal period, their midnight meal period.

Q. Now would you tell the Court what was done next?

A. At that time, why as soon as they were finished cleaning there we covered the hatch and released several bottles of CO₂ from the system.

Q. During that day did you apply CO₂ to this area? A. Yes.

Q. What is CO₂, Captain?

A. Carbon dioxide under heavy pressure. Well, it's carbon dioxide.

Q. And how is that used aboard ship?

A. It's in banks of large bottles and compressed, and these bottles are all connected to a main line, and you open the bottles, as many bottles as you

(Testimony of Richard C. Wilmarth.)

wish to use. Then you go to the manifold in the compartment on the vessel that you wish to smother or to apply your CO₂ and you open that proper valve in that manifold, and you can discharge as many bottles as you wish at any given time by opening the bottles. There's a special wrench for that. [97]

Q. Now, is that a permanent pipe installation?

A. Yes.

Q. Does the lower hold, lower number one hold of the Oregon Mail have a smothering line in it?

A. Yes.

Q. And was this CO₂ directed to that hold?

A. Yes.

Q. Would you tell the Court how many bottles of CO₂ were applied to that area during the 24th of August?

A. Well, let's see. On the 24th—

Q. I might ask a preliminary question, Captain. Have you made a computation of the total number of bottles applied? A. Yes, I did.

Q. Do you have a memorandum which would refresh your memory as to the number?

A. Yes. Forty-six bottles of CO₂ were discharged altogether, forty-one bottles on the 24th and four bottles on the 25th and one additional bottle on the 24th from the deck.

Q. Now—

The Court: How many bottles in all, please?

A. Sir?

The Court: Just repeat how many bottles in all you used.

(Testimony of Richard C. Wilmarth.)

A. Forty-six, sir.

The Court: You may inquire. [98]

Q. (By Mr. Crutcher): Captain, were those bottles applied all at the same time or over an interval of time?

A. No, the bottles were released, some—nine bottles at one time, eight bottles another and four bottles at another time and two bottles—

The Court: Beginning when and ending when did the releasing of the CO₂ take place?

A. In the morning at 3:05 of the 24th.

Q. (By Mr. Crutcher): When was the last bottle—

The Court: Wait just a minute.

Mr. Crutcher: I beg your pardon, your Honor.

The Court: When was the first CO₂ put down the drain pipes or wherever you put it down that you previously spoke of? What was the first hour of the first day you began using that CO₂?

A. The first day we used the CO₂ was—

The Court: Yes, sir, but what day was that?

A. A portable bottle, was on the 23rd.

The Court: Beginning the 23rd about what time?

A. At 9:30 at night.

The Court: And then when did you quit using it altogether?

A. On the 25th.

The Court: What hour?

A. 1330. That would be 1:30 in the [99] afternoon.

The Court: You may inquire.

(Testimony of Richard C. Wilmarth.)

Q. (By Mr. Crutcher): Captain, what was the effect of applying this CO₂ to the number one lower hold?

A. Well, it smothered what fire there was down there. It smothered, put out the fire.

Q. How did you know that?

A. Well, the surveyors came down, we all went down and there was no more smoke down there and there was—

Q. Well, maybe you misunderstood my question, Captain. A. Oh.

Q. Before you went down into the hold did you have any way of observing what effect it had had on that area? That is, let me ask you this: Was there any more smoke coming from the smoke detector?

A. Oh. There was no more smoke coming from the detector and no more odor of smoke.

Q. Are we referring now to the 25th?

A. Yes.

Q. Now, Captain, when did they start taking barley out as distinguished from this other cargo that had been on top of it?

A. At eight o'clock on the 25th, eight o'clock in the morning.

Q. And how long did that operation continue? That is, I'm asking now, Captain, when was it that they finally cleared out the barley down to the area in the lower hold as far [100] as they went?

A. Well, they were still working there on the 26th.

Q. Well, then when did they finish?

(Testimony of Richard C. Wilmarth.)

A. That was at 10:30 in the morning they stopped discharging grain.

* * *

Q. (By Mr. Crutcher): Now, during any of this time from Monday until Friday had they been loading other cargo in the vessel?

A. Only that reefer cargo we referred to.

Q. And why was it that you weren't loading other cargo?

A. Well, there was just the possibility that a dangerous situation might exist to other people on the ship.

Q. Danger from what source?

A. And the rest of the cargo on the ship.

Q. Danger from what source?

A. Well, after all, there was a fire in the ship, and wherever there's a fire, there's danger.

Q. Now, Captain, did you personally go down into the number one lower hold after they discharged the barley? [101] A. Yes.

Q. Would you describe to the Court what you observed down there? And I'm referring now to the physical condition of the after part of number one lower hold.

A. I observed the paint work was badly scorched, discolored, and that the hold light there in the after end was blackened.

The Court: What was blackened?

A. The cargo light in the hold, the installed cargo light.

(Testimony of Richard C. Wilmarth.)

The Court: Cargo light? A. Yes, sir.

The Court: You many inquire.

A. And definite evidence of smoke and scorch.

Q. (By Mr. Crutcher): Was this on the overhead?

A. This was on the overhead and on the after end of the—the after side of the hatch beam or coaming.

Q. I wish to ask you one question that relates back just a moment in time, Captain. Previously on the day or on the preceding day had you helped to bring out a bucket or more of this charred barley that was being taken from that area?

A. Yes, I did.

Q. Would you tell the Court what the appearance of the barley was in that bucket? [102]

A. It was black, and it was actually crackling and the bucket itself was hot.

Q. Did you touch the bucket?

A. Yes, sir.

Q. Would you tell the Court what the sensation was?

A. The bucket was too hot to handle by hand, to hold in your hands.

Q. Was there any smoke issuing from that?

A. No, I didn't see it.

Q. Now, Captain, had you previously observed a fire on board a ship? A. On any ship?

Q. Yes.

A. Small fires on various vessels that I've been in, paint locker fires and galley.

(Testimony of Richard C. Wilmarth.)

Q. Are you familiar with the effect which fire has on a painted steel plating surface? A. Yes.

Q. On a ship? [103] A. Yes.

* * *

Q. (By Mr. Crutcher): Captain Wilmarth, these fires that you mentioned a moment ago on other vessels, were you personally aboard the vessel at the time these fires occurred? [105]

A. Yes.

Q. And did you personally know that there was a fire in the area which was affected? A. Yes.

Q. Did you personally observe the surface, the metal plating surface of the vessel area where such fires occurred? A. Yes.

Q. Was that a part of the performance of your duties as an officer? A. Yes.

* * *

Q. (By Mr. Crutcher): Captain, I'm now referring to the Oregon Mail again and the number one lower hold. Would [106] you tell the Court about what time you went down into the hold, if you recall?

A. We went down there on the—(referring to the log book)—on the 25th. That was in the lower hold.

* * *

(A blueprint plan of SS Ocean Mail and SS Washington Mail was marked Respondent's Exhibit No. A-3 for identification.)

(Testimony of Richard C. Wilmarth.)

(A half size blueprint plan was marked Respondent's Exhibit No. A-4 for identification.)

* * *

Q. (By Mr. Crutcher): Captain, showing you a photostatic copy of a blueprint which has been marked for identification as Respondent's Exhibit A-3, I will ask you if you recognize what that is?

A. Yes. This is a blueprint of the hold plan and deck plan of the Oregon Mail.

Q. Are you personally familiar with the vessel plans for that vessel? A. Yes.

* * *

Q. (By Mr. Crutcher): Will you describe generally to the Court what this blueprint is, Captain?

A. Well, this is a builder's blueprint of the ship. Over [108] here on the right is the immersion plan and the capacities of all the various compartments, and over here is the—

The Court: The capacity for holding cargo, or what do you mean?

A. The cubic capacity, sir.

The Court: Do you mean the cubic capacity for receiving cargo?

A. The internal cubic capacity of the compartments, sir, whatever it is designed for.

The Court: You may proceed.

Q. (By Mr. Crutcher): Does that include all of the space? A. All the spaces on the ship, yes.

Referring to the plan showing number one hold and number one king post— A. Yes.

Q. —and number two deep tanks, I ask you,

(Testimony of Richard C. Wilmarth.)

Captain, whether this plan fairly shows the construction of that area of the vessel as of August, 1955?

A. Yes, it does.

Mr. Crutcher: Your Honor, I will offer Respondent's Exhibit A-3.

Mr. Detels: No objection.

The Court: Admitted.

(Respondent's Exhibit No. A-3 for identification was admitted in evidence.) [109]

Q. (By Mr. Crutcher): Next, Captain, I will ask you to look at the half—or excuse me.

Mr. Crutcher: Your Honor, I think it will be stipulated that Respondent's Exhibit A-4 is a half of the ship's plan cut for convenience to be more easily examined by the witness and by the Court and that it is an exact copy from Respondent's Exhibit A-3. Is that agreeable?

Mr. Detels: No objection. It is so stipulated.

Mr. Crutcher: With that understanding, your Honor, I offer Respondent's Exhibit A-4 and request that the witness now refer to that rather than to Respondent's Exhibit A-3, simply as a matter of physical convenience.

The Court: It is now admitted, A-4.

(Respondent's Exhibit No. A-4 for identification was admitted in evidence.) [110]

* * *

Q. (By Mr. Crutcher): Captain, will you state what the top figure is in Respondent's Exhibit A-4?

(Testimony of Richard C. Wilmarth.)

A. The top figure is the longitudinal plan, the profile plan of the ship.

Q. Are you referring now to the Oregon Mail?

A. The SS Oregon Mail.

Q. I ask you next to refer to the figure below that.

A. That is the deck, the weather deck plan, looking down, as if you were looking down on the ship, directly down on it.

Q. And now the third figure down?

A. That would be the upper 'tween deck.

Q. Would this be it at the level of the upper 'tween deck?

A. Yes, looking down from above.

Q. Now I ask you to refer to the fourth figure down.

A. That would be the lower 'tween deck.

Q. Finally I ask you to refer to the bottom figure on Respondent's Exhibit A-4. [112]

A. That's the bottom of the hold and the tank tops.

* * *

Q. (By Mr. Crutcher): What do these drawings represent in relation to the actual dimensions of the Oregon Mail?

A. This is a scale blueprint of the vessel.

Q. Now, Captain, I ask you to refer to the area known as the number one hold, and I wish you to point out to the Court which hold we're talking about as shown or illustrated on this diagram.

A. This is the number one hold. The holds are

(Testimony of Richard C. Wilmarth.)

numbered from forward to aft, and the foremost hold is number one. [113]

* * *

Q. (By Mr. Crutcher): I ask you to refer to the top figure in the diagram marked Respondent's Exhibit A-4 and circle the term "No. 1 Hold" shown on that diagram. A. Yes.

Q. Is this the area which has previously been referred to in your testimony as the number one lower hold? A. Yes.

Q. And now, Captain, I will ask you to show to the Court the area which you examined on August 25th, and I revert back now to your previous testimony before the recess. Will you please show the Court what area you have been referring to as the area which you examined on that day after the barley had been removed?

A. Do you want me to—I have it marked in red right here.

Mr. Crutcher: I ask the Court to note the area which has been shown.

A. That would be the top figure only?

The Court: I like words and figures stated by word of mouth.

Mr. Crutcher: I appreciate—

The Court: That does me lots more good than to see— [114]

* * *

Q. (By Mr. Crutcher): Now, Captain Wilmarth, I'm asking you to refer back to this time

(Testimony of Richard C. Wilmarth.)

which you have previously mentioned when you went down into the hold. Was that during daylight hours?

A. Yes.

Q. Were the hatches open? A. Yes.

Q. Did you have any source of artificial light?

A. No.

Q. Now, did you examine the overhead area aft of the after coaming in number one lower hold?

A. Yes.

Q. Did you examine the cables? A. Sir?

Q. The wiring for the light in that area?

A. Yes.

Q. Did you examine the light fixture?

A. Yes.

Q. Now, would you please describe to the Court the purpose [115] of your examination and what you observed down there?

* * *

A. We went down to see the extent of the damage and ascertain if there was any damage to the hull or structure of the vessel and just what had—a general inspection, as well as to see if the fire was completely out.

Q. Was this—

Mr. Detels: I move—never mind, I withdraw the objection.

Q. (By Mr. Crutcher): Was this in pursuance of your duties as master of the vessel?

A. Please, again?

Q. I say, was this inspection which you made in pursuance of your duty as master of the vessel?

(Testimony of Richard C. Wilmarth.)

A. Oh, yes. Yes, it was.

Q. Now, as a result of that examination did you reach a conclusion or form some opinion as to what had—I beg your pardon. That's a misplaced question.

Captain, would you describe to the Court the condition of these parts of the hold which I've mentioned at the time you made that examination in your own words, please?

A. Well, the paint was definitely scorched and black and the light itself was badly damaged and blackened and the cable was definitely black and damaged and there was a CO₂ pipe across the overhead that had the painting off it. [116] Otherwise there was just evidence of fire.

Q. Now, in what area or what part of the after end of number one lower hold was this condition?

A. This was on the after side of the hatch coaming in the lower hold, the lower hold hatch coaming.

Q. About how far aft of the hatch coaming did it extend? A. Six to eight feet.

Q. And how far away from the port beam, that is the beam running aft from the port side of the hatch? A. How far aft from this beam?

Q. Yes.

A. I would say about five to six feet.

Q. Is that the same dimension you were just mentioning? A. Yes.

Q. All right. Now, how far did it run along the edge of the hatch coaming, if it did?

(Testimony of Richard C. Wilmarth.)

A. Inboard from that?

Q. Towards the center line.

A. I don't remember. About five or six feet, as I remember it.

Q. Did you have any way of determining how deep this fire had penetrated into the barley itself?

Mr. Detels: I will object to the question as assuming the existence of a fire which has not been testified to. [117]

Mr. Crutcher: I'll withdraw the question, your Honor.

The Court: It is withdrawn. Modify the question.

Q. (By Mr. Crutcher): I meant to say, Captain, did you have any means of determining how deep the charring had gone into the barley from the top of the barley? A. No.

Q. At the time that you examined the hold had the char been removed? I'm talking now about the charred barley. A. Most of it, yes.

Q. At that time was there any further evidence of crackling or smoking? A. Not at that time.

Q. Or heat? A. No. [118]

* * *

Q. (By Mr. Crutcher): Captain, I will ask you to describe in detail the condition of the steel overhead in that area as you observed it at that time.

A. It was black and definitely burned, the paint.

Q. Now, is there a difference between blackened by smoke and burning? A. Yes.

(Testimony of Richard C. Wilmarth.)

Q. So far as this area would be concerned?

A. Yes.

Mr. Detels: I will object to that question as also calling for expert testimony with regard to the characteristics of paint.

The Court: The objection is sustained. [119] Nearly all of such objections could be obviated if Counsel would include in his question, "State if you know," and especially the last one. I am not sure that the objection would be obviated when it goes to one speaking as an expert witness.

Q. (By Mr. Crutcher): Captain, I am referring back now to your previous testimony about having observed the condition of steel plating burned by other fires, and I will ask you whether you know of your own knowledge whether there is a difference between the appearance of smoke and actual burning on the surface of painted steel plating in a vessel.

A. Yes.

Q. And what is that difference?

A. Smoke would merely discolor the paint. The paint itself would have been undisturbed underneath the soot, we'll call it, whereas burned paint definitely is burned. The paint is burned off.

Q. Now, referring to your examination of the overhead on the day of August 25, 1955, in the lower hold of the Oregon Mail aft of the hatch coaming, I ask you, did you observe, make an observation there as to whether this was smoke or whether it was a burned effect on the surface? [120]

(Testimony of Richard C. Wilmarth.)

A. It was—yes.

Q. (By Mr. Crutcher): And would you state what that was? A. It was burned. [121]

* * *

Q. I say based upon your observation of that metal surface on the overhead of number one lower hold, did you make any further examination of other metal areas in that vicinity?

A. Yes, we went around to the starboard side and looked in there to make sure there was nothing in there, and under all the other overhead beams and so forth on both sides of the girder.

Q. Did you find any evidence of burning in other areas? A. Not of burning, no.

Q. Now, getting back to this area aft of the coaming in [122] number one lower hold on the port side, I will ask you whether as a result of your examining that overhead you formed a conclusion as to whether or not there had been a fire there?

A. Yes.

Q. This can be answered yes or no. A. Yes.

Q. And would you state what that conclusion was? [123]

* * *

A. That there had been a fire in that area.

Q. Were you able to judge the extent of that fire as far as area was concerned? A. Yes.

Q. Was that extent approximately the same as the dimensions which you have previously testified to? A. Yes.

(Testimony of Richard C. Wilmarth.)

Q. Were you able to judge the intensity of heat or fire in that area? A. No. [126]

* * *

Q. (By Mr. Crutcher): Captain, can you state the time when it was determined that there was no further danger of combustion or fire aboard the ship? A. What was that again, please?

Q. I ask you to advise the Court when it was, that is on the 24th or 25th or 26th, that it was determined that the vessel was no longer in any danger.

(Witness refers to log book.)

A. At seven o'clock the night of the 25th the last evidence [128] of smoldering fire was put out. That was determined by us. The following day on the 26th it was inspected at nine o'clock in the morning by the Coast Guard officer. [129]

* * *

Q. (By Mr. Crutcher): Captain, as a result of your inspection of the area and your experience in dealing with this combustion in number one lower hold during the week commencing on August 21st did you reach any decision or conclusion as to whether it would have been safe to continue loading and proceed to sea without combating this combustion or burning in the number one lower hold? A. Yes.

Q. And what was that conclusion?

A. That the ship was ready for sea, would be ready for sea.

(Testimony of Richard C. Wilmarth.)

Q. I think you misunderstood my question. What would have happened if you had failed to—

A. Oh.

Q. —go down into the number one lower hold to combat the burning?

Mr. Detels: I will object to the question as calling for an expert answer from an unqualified witness.

The Court: I want to hear the question again.

(The reporter read the last question interrupted by the answer "Oh.")

The Court: The objection is overruled.

Q. (By Mr. Crutcher): Do you understand the question, Captain? A. Yes. [130]

Q. Would you please advise the Court of what in your judgment would have been the result of proceeding to sea without going down and combating this burning in the number one lower hold?

A. Well, the fire would have definitely advanced and possibly the heat would have distorted the frames, weakened the vessel, and the deep tank right abaft that compartment was filled with oil, it could have caused further very dangerous fires. In fact, the whole thing could have—the ship would have definitely been in danger.

Q. Would that danger have extended to the cargo which was then aboard the vessel?

A. Sir?

Q. I say would that danger extend to the cargo which was then aboard the Oregon Mail?

(Testimony of Richard C. Wilmarth.)

A. Oh, yes, the cargo as well as the ship.

* * *

Cross-Examination

By Mr. Detels:

Q. Captain Wilmarth, you have testified today with respect to certain events occurring aboard the Oregon Mail prior [131] to the morning of August 21st. Do you recall that your deposition was taken in Seattle on the 18th of April, 1958, in connection with this case? A. Yes, sir.

Q. Did you testify at that time that to the best of your recollection you had not been aboard the vessel as master prior to the morning of August 21st when the vessel arrived at Seattle? A. Yes.

Q. Was the rough log of the vessel available to you at the time of the deposition to refresh your recollection? A. Yes.

Q. Is it now your testimony that you did go aboard the vessel as master prior to August 21st?

A. Yes.

Q. Has anything been available to you to refresh your recollection which was not available to you at the time your deposition was taken? A. Yes.

Q. What have you referred to?

A. My own papers, my pay voucher and letter of assignment to the vessel, and then my own recollection, thinking back on it.

Q. So that you have referred to administrative matters of payroll records and the like rather than

(Testimony of Richard C. Wilmarth.)

to any notes [132] or records you kept as to happenings aboard the vessel? A. That's right.

Q. It is a fact, is it not, that at the time your deposition was taken you were unable to recall anything which had occurred on the vessel prior to August 21st? A. Yes.

Q. Have you referred to anything which has refreshed your recollection of the events on the vessel prior to August 21st as distinguished from the fact you were aboard it? A. Yes.

Q. What is that?

A. This deck log here before me.

Q. You had that available to you at the time your deposition was taken, did you not?

A. Yes.

Q. And you did refer to it, did you not?

A. Yes.

Q. Now, proceeding to the testimony you gave with reference to the happenings at Vancouver, B. C., on the night of August 20th, what report was first made to you which directed your attention to the smoke detector cabinet on that occasion?

A. Just that there was an odor coming from this exhaust.

Q. Who made that report? [133]

A. One of the officers.

Q. Were you present in the courtroom yesterday when the second officer, Mr. Tomlin, testified?

A. Was I here yesterday?

Q. Yes. A. Yes.

(Testimony of Richard C. Wilmarth.)

Q. You were present in the courtroom when he was on the witness stand?

A. Yes, but I couldn't hear very well what he was saying.

The Court: I think the Court observed that the witness had great difficulty in hearing what was said in the courtroom yesterday before the witness took the witness stand today, for whatever information or reminder that may be worth to Counsel. You may proceed.

Q. (By Mr. Detels): Did you hear him testify that it was he who made the report and that he had observed smoke rather than an odor and that he reported smoke to the chief mate and yourself at that time? A. No, I didn't.

Q. Did you yourself detect an odor in the vicinity of the smoke detector cabinet?

A. I detected an odor, yes.

Q. At that evening? A. Yes.

Q. Was the second officer with you at the time you made that [134] observation?

A. I don't know. I don't remember which one of the officers was with me.

Q. In the ordinary course of operation is it not a fact that the air which is being drawn from the holds into the smoke detector cabinet is vented out onto the wing of the bridge without entering the wheelhouse? A. Yes.

Q. So that any odor which may be—

A. Oh, just a minute, sir. Not on all ships.

The Court: "Not on all ships." Is that what you

(Testimony of Richard C. Wilmarth.)

said, Captain? A. Yes, sir.

Q. (By Mr. Detels): Well, with reference to the Oregon Mail?

A. It's on the outside on the Oregon Mail, yes.

Q. So that no air from the holds ordinarily enters the wheelhouse without the performance of some operation at the smoke detector cabinet?

A. Yes.

Q. So that it is impossible to detect an odor coming in through the smoke detector unless a valve is opened to introduce the air into the wheelhouse rather than permitting it to exhaust onto the wing of the bridge? A. Yes.

Q. Did you turn that valve? [135]

A. No. We were outside, and there's a sliding valve on the exhaust pipe which lets it out right directly down on top of you, and that's where we —when I went up to look at it was opened that.

Q. Is that inside the wheelhouse or outside?

A. Outside.

Q. Well, did you detect an odor inside the wheelhouse itself at any time?

A. I don't recall it.

Q. So that the observation you made was made on the wing of the bridge? A. Yes.

Q. Was it customary aboard the Oregon Mail when you were the master for the watch officers to turn the valve which vented the air from the hose into the wheelhouse with any regular frequency?

A. No. There's no valve that you're speaking of

(Testimony of Richard C. Wilmarth.)

into the wheelhouse. It's in the smoke detector system itself.

Q. Well, if I have understood your testimony—— A. Sir?

Q. I say if I have understood your testimony——

A. Yes.

Q. —no odor was detected in the wheelhouse itself because the air coming from the hose was never exhausted into the wheelhouse at any time on the night of August 20th. [136]

A. It's exhausted into the cabinet of the detector system which is in the wheelhouse.

Q. And that has a glass cover over it, does it not?

A. It has what?

Q. Does that not have a glass cover on it?

A. Yes.

Q. Does that air ever enter into the wheelhouse at large or does it remain in the cabinet and then pass out onto the wing of the bridge?

A. As far as I know it remains in the cabinet or passes out through. It doesn't come into the pilothouse.

* * *

Q. Captain Wilmarth, referring again to the smoke detector cabinet in the wheelhouse of the Oregon Mail, I ask you if it is possible to detect the odors in the air which is passing through the smoke detector cabinet from inside the wheelhouse?

A. Inside the wheelhouse?

Q. Yes. A. I don't think so.

Q. So that in order for anybody to detect an

(Testimony of Richard C. Wilmarth.)

odor they would have to go out on the wing of the bridge? A. Yes.

Q. And they would then have to turn a valve or make some manual operation on the mechanism in order to sample the air that was coming through the cabinet?

A. No. No, it comes out anyhow. It would come out anyhow, but you can open that valve and make it come out a lot [138] stronger.

The Court: Where would it come out, with reference to—

A. As I remember now it comes right out the end of the pipe, but there's a valve—

The Court: Where is the pipe end with reference to the deck?

A. It's right outside the pilothouse on the port wing of the bridge.

The Court: So it is near the bridge, then; if it is not inside the bridge it is near the bridge, is that right? A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Detels): Did you detect an odor at any time inside the wheelhouse?

A. I don't recall that I did.

Q. In view of the fact that on April 18, 1958, you were unable to recall that you were aboard the ship on the evening of August 20th, are you able to state positively now with respect to the evening of August 20, 1955, that you did not observe smoke?

A. I did not see smoke, no.

Q. Can you describe the odor which you did detect?

(Testimony of Richard C. Wilmarth.)

A. No, I can't describe it in words. [139]

Q. Had you on any previous occasion smelled the odor of burning grain?

A. Come again, please?

Q. Had you ever prior to this time, August 20, 1955, smelled burning grain to your knowledge?

A. No, I never had.

The Court: How long have you been working on a ship?

A. On a—

The Court: Any ship. How long has it been since you worked on your first ship?

A. Thirty years ago, thirty-two years ago.

The Court: You had worked on all sorts of ships carrying cargo, had you?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Detels): Now, as a result of making this observation of an odor did you direct that anything be done at that time?

A. What is it, please?

Q. Did you issue any order or did you yourself do anything as a result of determining that there was an odor coming from the smoke detector onto the wing of the bridge?

A. Yes, we did. As I say, I ordered the officers to keep a continuous watch or a frequent watch on the smoke [140] detector, and then later on we got some grain out by hand and we took it down to the galley stove and heated it up and smelled it, just to see if we could get the same smell out of it.

(Testimony of Richard C. Wilmarth.)

Q. When was that done, Captain?

A. I don't remember, but it was right around that period there. I don't remember the exact time.

The Court: Where were you on the ship when you first smelled the smoke, smelled the smoke?

A. Well, I was either in my room or on the bridge with the pilot. I don't remember, Your Honor.

The Court: You may inquire.

The Witness: And I was called by the officer that called my attention to it.

Q. (By Mr. Detels): Did you yourself take any part in this attempt to determine by using a handful of barley what the odor of that would be if it were subjected to heat? A. Yes, sir.

Q. And you have no recollection now of when that was done? A. No, I don't.

Q. Can you state whether or not it was after the vessel arrived in Seattle on the morning of August 21st?

A. I don't remember when it was, whether we were still en route from Vancouver, B. C., or whether we were in port.

Q. What odor did you detect when you subjected the barley [141] to heat on the stove?

A. It did smell very similar to what we were smelling except the other came through a long pipe and we didn't know, but there was a similarity of odors.

Q. Who participated in making that experiment?

A. I don't remember, but presumably the chief mate and myself.

(Testimony of Richard C. Wilmarth.)

Q. Do you recall whether or not that was before Captain Greenwood came aboard the vessel?

A. No, sir, I don't recall that.

The Court: Do you know of Captain Greenwood's career as a seafaring man or man interested in and having experience in ocean shipping affairs?

A. No, sir, I don't.

The Court: You do not know anything about his waterfront experience before he became a port captain?

A. I believe he was in British ships before. That's all I know.

The Court: You may inquire.

Q. (By Mr. Detels): To your knowledge was the smoke detector apparatus concentrated on the line from the number one lower hold on the evening of August 20th at Vancouver, B. C.?

A. We did it, we went through all the various holds and finally found it in number one then.

Q. I'm referring now to closing the valves on the air suction [142] lines leading from all other compartments of the vessel except the number one lower hold, and I'm asking you if the detector was concentrated on the suction line from the number one lower hold on the night of August 20th.

A. I don't remember exactly when we did it, whether we did it then or the 21st. It probably would be in the log.

Q. Now, was any report made to you on the evening of August 20th to which you have not testified already? A. I don't think so.

(Testimony of Richard C. Wilmarth.)

Q. Did you make any report of the condition which you observed to the offices of American Mail Line prior to the time that the vessel arrived in Seattle on the morning of August 21st?

A. No.

Q. Did the information which you had which you obtained by detecting the odor in the vicinity of the smoke detector indicate to you on the evening of August 20th that there was damage being done to the barley in the number one lower hold?

A. As I said before, we hadn't determined what this odor was for sure, so we didn't know at that time whether there was any damage to the barley or not, on August the 20th.

Q. Did you take any steps other than what you have previously mentioned to determine whether or not that barley was [143] being damaged at that time? A. Not at that time.

Q. There is a shore telephone connection aboard the ship while it's in port at Vancouver, B. C., is there not? A. Yes.

Q. And there was on this particular occasion?

A. (Witness nods his head.)

Q. Your answer was yes? A. Yes.

Q. Did you use that telephone to attempt to communicate this information to the port captain or any other official of the American Mail Line?

A. No.

Q. After you detected this odor the vessel continued to load cargo at Vancouver, B. C., did it not?

A. Well, that I can't remember, exactly when the

(Testimony of Richard C. Wilmarth.)

smoke was first reported to me, or the odor was first reported to me.

Q. Well, now, are you sure that it was an odor and not smoke that was reported to you?

A. He reported that there was a definite odor, and that it was probably smoke. That's the way it was reported to me, but I don't remember whether it was when we were coming down from Vancouver or when we were actually in port. [144]

Q. Well, is it your practice to read the entries in the rough deck log for a particular day prior to signing that page of the log? A. Usually, yes.

Q. Did you do so with respect to the entries in the log for Saturday, August 20, 1955?

A. I presume I did. I don't remember.

Mr. Detels: May the witness be handed Libellant's Exhibit 1?

The Court: That will be done.

(The exhibit was handed to the witness.)

* * *

Q. (By Mr. Detels): I apologize, Captain. There appear to be two sets of pages for the date August 20th, and I'm referring now to the entry on the left-hand side of the second series of pages under the time 1800. Does that refresh your recollection as to the time when this condition was reported to you?

A. It doesn't ring a bell with me personally, no, the fact that it was at that time.

Q. Well, are you able to recall when the ship

(Testimony of Richard C. Wilmarth.)

discontinued the loading of cargo at Vancouver on August 20th?

A. No, she continued to load cargo in Vancouver.

Q. Loading was not discontinued as a result of this observation or finding? A. No.

The Court: What is your information if you have any, as to the first date in August on which this smoke was first detected on the smoke indicator or otherwise?

A. August the 20th. [146]

* * *

Q. (By Mr. Detels): Now, when the vessel arrived at Seattle, as I understand it on the early morning of August 21, 1955, did you make any report to any shore representative of American Mail Line? A. Not when we arrived.

Q. Did you make any report at any time on that day?

A. Yes, at nine o'clock that morning. [147]

Q. And how did you make that report?

A. I telephoned Captain Greenwood.

Q. And he is the port captain?

A. Yes, sir.

Q. Is he the official to whom you as the master of the vessel are responsible? A. Yes.

Q. What did you report to him?

A. I said, "We have all the indications of a fire in number one lower hold."

Q. Did he subsequently come aboard the vessel himself on that morning? A. Yes.

Q. Now, during the day of Sunday, August 21st,

(Testimony of Richard C. Wilmarth.)

the ship continued to load cargo on her normal schedule, did she not? A. Yes.

Q. And that is also true as to the 22nd of August, the following day? A. Yes.

Q. At least until some time in the afternoon, is that not correct? A. Yes.

Q. So that the first time that the ship departed from her normal schedule by reason of anything which had been observed or found aboard the vessel was at 1900 hours [148] on August 22nd, was it not?

A. At what hours?

Q. 1900.

A. No, we stopped loading at 1545.

The Court: May I ask you again after referring to the A-1 exhibit, Respondent's Exhibit A-1, a log book, do you still say that the first time you observed, whether you smelled it or saw it indicated on a register of some sort, that smoke in that hold was on what date? State the date again?

A. August the 20th.

The Court: That is the first date that you observed that smoke?

A. Yes, sir.

* * *

Q. (By Mr. Detels): Well, perhaps I should put it this way, Captain: Loading was discontinued at approximately 1545 hours? A. Yes.

Q. Or 3:45 p.m. on Monday, August 22nd?

A. Yes.

Q. Insofar as the safety of the cargo was concerned was anything done prior to that time and

(Testimony of Richard C. Wilmarth.)

date by reason of the observations made at Vancouver, B. C., on the evening [149] of the 20th?

A. Well, we were already discharging the cargo in number one.

Q. When did that commence?

A. Well, that—apparently here—(referring to log book)—1300 on the 22nd.

Q. Captain, referring to the left-hand side of the log book for Monday, August 22nd, and if there are two pages it may be on the second series of pages, will you read the entry under the time 1545?

A. (Reading): "Received instructions from AML office to stop loading all cargo except reefer."

Q. And was it subsequent to the receipt of that instruction that the loading of cargo was discontinued?

A. The loading was discontinued then, yes.

Q. Now, I think you testified previously that it was you who made the decision or determination to stop loading cargo on the afternoon of August 22nd?

A. Yes.

Q. Does the entry which you have just read refresh your recollection as to whether or not that decision was made by shore personnel of the American Mail Line?

A. It was my decision. We had conferred in my quarters, but it was my decision to stop the loading, my recommendation.

Q. Well, who issued the instructions to the officer on watch to discontinue the loading? [150]

(Testimony of Richard C. Wilmarth.)

A. Well, during the loading, why the chief officer—

The Court: No—

A. Sir?

The Court: Just answer it directly. Who issued the orders to the people on the dock to stop bringing cargo aboard?

A. The chief officer.

Q. (By Mr. Detels): Who instructed him to see that that was done? A. I did.

Q. I believe you testified that an effort was made to determine the temperature of the barley in the number one lower hold by means of dropping a thermometer into the hold? A. Yes.

Q. And what date was that done?

A. That was on Sunday, August the 21st.

Q. Were you present when that was done?

A. Yes.

Q. Was it done at your direction? A. Yes.

Q. Do you recall who did it? A. No.

Q. Can you state what finding was made as to the temperature of the cargo in the number one lower hold at that time? [151]

A. What was that again, please?

Q. What readings or what temperature was ascertained by that means at that time?

A. Oh. As I remember there was no abnormal temperatures that showed on that method of trying to get the temperature.

Q. And that was done by dropping a thermometer designed for that purpose down the sounding pipes

(Testimony of Richard C. Wilmarth.)
of the vessel from the deck into the number one
lower hold? A. Yes.

Q. So that the thermometer would be on the
grain or in the grain or barley for a period in
order for you to be able to get a reading?

A. Yes.

Q. Captain, have you had any training in
metallurgy? A. No.

Q. Now, you have used the word "fire" several
times in your testimony, and I would like to have
you explain what you mean when you use that word?

A. Fire?

The Court: Fire.

A. Whenever anything is burning it's on fire.

Q. (By Mr. Detels): Well, does that include
the notion of flame, visible flame, to your mind?

A. Well, not necessarily, no, but it usually does,
yes.

Q. Now, did you see any flame at any time? [152]

A. No.

Q. Now, on the other occasions to which you
testified when you observed the results of burning
on metal surfaces, did you observe a flame?

A. No.

Q. You did not actually witness any flame on
those other occasions on other vessels?

A. On other vessels?

Q. Yes. A. Yes, I saw flame then.

Q. So that the record may be clear, I've been
inquiring now with reference to the occasions about
which Mr. Crutcher inquired when you had seen

(Testimony of Richard C. Wilmarth.)

the effects of fire in paint lockers and in other spaces on vessels at different times than the time we are concerned with on the Oregon Mail?

A. Yes.

Q. And I'm asking you if you saw a flame on those occasions? A. Yes.

Q. I see. Was that what indicated to you that there was a fire on each of those occasions?

A. Now again, please?

Q. Was your observation of flame the fact which satisfied you that there was a fire on those occasions?

A. Yes.

Q. Do you have any knowledge of the temperature at which [153] barley will become scorched or blackened in appearance? A. No.

Q. Do you have any knowledge of whether or not that can occur without flame? A. No.

Q. Do you have any knowledge of whether or not paint can become scorched or blackened in the absence of flame?

A. By overheating it can, yes, depending on the type of paint.

Q. You can produce this black and scorched effect by heat alone without flame? A. Yes.

Q. Have you observed that in your experience?

A. Yes.

Q. And that would be true as to painted metal surfaces such as you had in the number one lower hold of the Oregon Mail?

(Testimony of Richard C. Wilmarth.)

A. Yes.

Q. (By Mr. Detels): Have you observed at any time conditions similar to those that you observed in the lower hold of the Oregon Mail when you made your inspection after the [154] barley was discharged to have been produced by heat in the absence of flame? A. Yes.

Q. To your knowledge was any effort made to obtain the temperature of this grain in the number one lower hold after the time to which you have testified on August 21st? A. No.

The Court: Was there any attempt to test the temperature in the hold above and around the grain before you observed the smoke, at any time between that time and the time when the barley was received on board the vessel?

A. No, I don't recall any.

The Court: Was there any time when you could have made a test of the temperature of the atmosphere in and about the grain?

A. Yes.

The Court: By "atmosphere" I mean the air insofar as it concerns the body of the grain itself.

A. Yes.

The Court: Was that determined, do you know?

A. I don't recall that it was. As I remember there was no indication on the thermometers of any need.

The Court: My question was, is there a record or do you otherwise know that some person on behalf of [155] the ship or somebody else tested the tem-

(Testimony of Richard C. Wilmarth.)

perature in and about the wheat at any time, and if so, when and with what results, after the grain was loaded on board the vessel and before you observed the smoke.

A. No.

(Brief pause.)

Mr. Detels: May I proceed, your Honor?

The Court: You may.

Q. (By Mr. Detels): Well, to your knowledge the only time that a temperature reading was taken of the barley in the number one lower hold was on August 21st? A. Yes.

Q. Was there anything which prevented the taking of temperatures at any prior or any subsequent time? A. No.

Mr. Detels: No further cross-examination.

The Court: Any redirect?

Mr. Crutcher: Yes, your Honor.

The Court: Briefly, please, as briefly as possible.

Mr. Crutcher: Certainly.

Redirect Examination

By Mr. Crutcher:

Q. Just a moment ago, Captain, you testified that there was [156] nothing to prevent you from taking temperatures in the lower hold at any time, and I assume now you're referring to the time before the cargo was discharged in the number one hold. A. Yes.

(Testimony of Richard C. Wilmarth.)

Q. Before the carbon dioxide was applied. Are there any sounding pipes in the after end of the hatch coaming in the number one lower hold?

A. As I remember, there are.

Q. Where are the sounding pipes located in the lower hold?

A. On a C-3 I think they're on the outboard side of the deck, just a little forward of the masthouse. It would be right back in the after corner of the hatch, the hold.

Q. Yes, and would that be near this cargo light that you previously described on direct examination?

A. No.

Q. Where did the sounding pipes go? That is, do they end at the top of the hatch or do they go to the bottom?

A. They go from the weather deck right to the bottom of the ship.

The Court: Is there not a gap in it? When you get to the top of an open deck this sounding pipe does not continue on through the open deck, does it?

A. Right to the deck, yes, sir. It has a screw plug on the top and you open it up with a [157] screw plug.

The Court: Is there a bulkhead or is there something else to attach the pipe to so that the pipe will not be in the way of the handling of cargo?

A. It's over in the corner of the hatch, sir, in the corner of the hold, so it's out of the way of the cargo. [158]

* * *

(Testimony of Richard C. Wilmarth.)

Q. (By Mr. Crutcher): Captain, at the time that you dropped the thermometer into the sounding pipe was the barley still in place in the number one lower hold as it had been loaded at Vancouver, Washington? A. Yes.

Q. And was the other cargo still in place in the lower 'tween deck? A. Yes.

Q. Was there any—

The Court: In taking the temperature with a thermometer inside of a sealed pipe that is sealed all the way down between the top end of the sounding pipe on the top deck or wherever it ends at its topmost end and extends all the way down to the lowest point in the ship to which it goes, if you put a thermometer inside that pipe you would get the temperature inside the pipe, you would not get the temperature in the cargo space, would you?

A. If there was a fire in there, sir, the [159] fire would naturally heat the pipe adjacent to the—if there was any excess heat it would heat that pipe.

The Court: Is the sounding pipe used to obtain the temperature in the air in the cargo space as distinguished from the cargo itself?

A. No.

The Court: You may proceed.

Q. (By Mr. Crutcher): Thank you, Captain. Was there any way in which you could see this fire area which you described in your direct examination at any time before the 25th of August?

A. No.

Q. Why was that?

(Testimony of Richard C. Wilmarth.)

A. We couldn't get to it. We had to discharge all of the lower 'tween deck and all the grain that was in the lower 'tween deck to get down to the lower hold.

Q. Was there any other means of access to the lower hold? A. No.

Q. Captain, there's possibly some confusion in my mind with respect to this matter of smelling odor in or out of the pilothouse. The following question, which is my last question, has to do with that subject. Are the doors of the pilothouse left open in the summertime when the vessel is in port?

A. Yes—not always. It depends on what port we're in, but [160] they were in Seattle, I'm sure.

Q. Well, how about Vancouver, British Columbia? A. Yes.

Q. Is it possible that air from outside would pass through the pilothouse? A. Yes.

Mr. Detels: I'll object to that question as leading and speculative.

The Court: That objection is overruled.

* * *

Recross-Examination

By Mr. Detels:

Q. Do you have any recollection as to whether the pilothouse door was open or closed on the evening of August 20th? A. No, I don't. [161]

* * *

(Witness excused.)

(Testimony of Richard C. Wilmarth.)

The Court: Call the next witness.

Mr. Crutcher: May it please the Court, we would next like to offer a deposition, and I will ask Mr. McMullen to take the stand for the purpose of reading the answers. [162]

* * *

Mr. Crutcher: Thank you, your Honor. I'm now commencing with the deposition proper, and I would point out to your Honor that it was stipulated between the parties, as shown in this deposition, that all objections except to the form of the question and the responsiveness of the answer were reserved until time of trial. [163]

* * *

DEPOSITION OF RODNEY PALMER

“Q. Will you state your full name, Mr. Palmer?

“A. Rodney Palmer.

“Q. Where do you presently reside?

“A. Little Valley, Utah.

“Q. Were you the First Officer aboard the SS Oregon Mail on Voyage 33, being a voyage commencing about August, 1955? A. I was.

“Q. When did you start to sea, Mr. Palmer?

“A. In 1940.

“Q. In what capacity did you start?

“A. As an ordinary seaman.

“Q. Did you have any special education for the merchant marine thereafter?

(Deposition of Rodney Palmer.)

"A. I went to maritime school in Alameda and received my [164] license in 1944.

"Q. And which license is that?

"A. I received my Third Mate's license at that time.

"Q. And subsequently did you acquire other licenses as a deck officer?

"A. Yes, I acquired Second Mate, Chief Mate and Master's license.

"Q. Those licenses were issued by the United States Coast Guard? A. They were.

"Q. What type of Master's license do you presently hold?

"A. An unlimited master.

"Q. Did you continuously follow the sea after you commenced shipping as an ordinary seaman?

"A. Yes, I did.

"Q. On what types of vessels have you served?

"A. Both freighters and passenger ships in the Coastwise trade and offshore and foreign trade.

"Q. When did you start work with American Mail Line? A. In 1951.

"Q. In what capacity did you go to work for that firm? A. Junior Third Mate.

"Q. What trades did you operate while with the American Mail Line? A. Trans-Pacific. [165]

"Q. Would you state how many of their vessels you served on?

"A. Do you want the names of them, or just the number?

"Q. Well, no, the number. A. Four.

(Deposition of Rodney Palmer.)

“Q. Were those vessels what are called general cargo ships? A. Yes, they are.

“Q. When did you go aboard the SS Oregon Mail, about? A. In 1954.

“Q. In what capacity did you serve aboard that vessel? A. Chief Mate.

“Q. What kind of a ship is the Oregon Mail?

“A. A standard C-3 cargo freighter.

“Q. How many holds?

“A. Five hatches.

“Q. What sort of motive power?

“A. It is a gear steam turbine.

“Q. Do you recall when she was built?

“A. 1945, by Ingalls Shipyard.

“Q. With respect to Voyage 33, can you state where and when that voyage started?

“A. It commenced in August, 1955, at Portland, Oregon.

“Q. Will it assist you to refer to the deck log book for that voyage?

“A. It would, for the exact dates.” [166]

* * *

“Q. Now, Mr. Palmer, perhaps by referring to the smooth log book which has been marked as Respondent's Exhibit 'A' which you have before you, you can identify the exact time and date when this Voyage 33 commenced.

“A. It commenced at midnight on Saturday, August 13, 1955.

“Q. At what port?

“A. Portland, Oregon, Terminal 1, Berth 7.

(Deposition of Rodney Palmer.)

"Q. Will you state whether or not you were then aboard the ship, that is, serving aboard the ship at the commencement of the voyage?

"A. Yes, I was.

"Q. And what cargo generally was loaded at Portland, Oregon?

"A. General cargo mostly consisting of lumber, flour. That would be the cargo at Portland."

* * *

"Q. (By Mr. Crutcher): When did you finish loading at Portland, Mr. Palmer?"

* * *

"A. We finished loading at 9:00 o'clock on the evening of Tuesday, August 16, 1955. [167]

"Q. And where did the vessel go from there?

"A. It left the following morning, August 17 and went to Terminal 2 at Vancouver, Washington.

"Q. And what sort of a facility is that?

"A. It is a grain elevator.

"Q. And did you take on cargo at that port?

"A. That we did. We loaded two hatches of grain at the grain elevator.

"Q. Which hatches were those?

"A. No. 1 and No. 5.

"Q. What type of grain was that?

"A. A load of barley.

"Q. Now, with reference to No. 1 lower hold, before that was loaded, did you have occasion to go into that hold? A. Yes, I did.

(Deposition of Rodney Palmer.)

"Q. What was the purpose of your going into the hold?

"A. It was a routine inspection of the hold required preparatory to loading cargo, and also to inspect the shifting boards that are installed in the cargo for the safety of the vessel.

"Q. Can you describe the condition of the hold at that time?

"A. It was clean and seaworthy condition; all shoring, wire and structural were intact." [168]

* * *

"Q. (By Mr. Crutcher): I will ask you to rephrase your answer, Mr. Palmer, that is, your answer to this same question, namely, a general description of the hold. Can you state simply what you visually observed rather than what you concluded—omitting any conclusion you may have drawn as to the seaworthiness of the vessel, I will ask you more specifically first of all, was the hold clean at that time? A. Yes, it was.

"Q. Had it been cleaned in preparation for receiving this cargo? A. It had.

"Q. Did you examine the lights and wiring in that hold at that time? A. Yes.

"Q. Would you describe generally what the lights and wiring consisted of in that hold?

"A. Consisted of reflector-type flood lights and corrugated cable wiring.

"Q. Did the wiring lead to the flood lights?

"A. It led to the flood lights.

(Deposition of Rodney Palmer.)

“Q. And how many lights are there in that hold, or were at that time?

“I think you understand that whenever I ask you [169] about the condition of the vessel I am now referring to this occasion.

“A. There were eight lights.

“Q. And were they all of this type?

“A. Yes, they were.

“Q. Are these portable lights or are they fastened in some way to the vessel itself?

“A. They were permanent installations.

“Q. And where are they in the hold?

“A. They were located on the coamings on the overhead—they were fastened to the deck head behind the coamings, approximately 2 feet from the coamings.

“Q. Were the lights on at the time you examined the hold? A. Yes, they were.

“Q. Did anyone else inspect the hold at that port?

“A. The cargo surveyor for the Columbia River inspected it also.

“Q. Do you recall his name at this time?

“A. It is either Captain Bennett or Captain McClellan. There were two surveyors at the time, and I believe it was Captain Bennett.

“Q. Is he with National Cargo Bureau?

“A. Yes.” [170]

* * *

“Q. Did Captain Bennett make any statement to you regarding the condition of the hold, or con-

(Deposition of Rodney Palmer.)

fer with you in any way at that time? I am asking, did he call your attention to any condition to which he objected? A. No.

"Q. Now, after you had been in that hold, how soon after did they start loading?

"A. May I refer to the log book?

"Q. Yes, if it will refresh your recollection.

"A. (Referring to log book): It was approximately an hour after we made the inspection that we started to load.

"Q. And how do they load grain from that terminal? A. They use spouts.

"Q. Was there anyone in the hold during the time they were pouring the grain in?

"A. No, there is not.

"Q. Did that grain fill the No. 1 lower hold?

"A. That filled the lower hold and flowed over to the lower 'tween deck. [171]

"Q. Now, after you were in the hold and before they started loading, did you turn out the lights that were in there? A. Yes, I did.

"Q. Where is the switch box for the No. 1 lower hold? A. It is located at No. 1 masthouse.

"Q. Is that what is sometimes referred to as a resistor house?

"A. It is commonly called both the same.

"Q. Where is that located?

"A. Between No. 1 and No. 2 hatch, on deck.

"Q. Would you describe generally what sort of a house it is?

"A. It is a steel enclosure with a single water-

(Deposition of Rodney Palmer.)

tight opening with a screen—with a screen door installed inside the water-tight door.

“Q. Is there a lock on the screen door?

“A. Yes, there is.

“Q. What is the purpose of that lock?

“A. To keep trespassers and unauthorized persons out of the resistor house.

“Q. Did you have a key to that lock?

“A. I did.

“Q. Did the electrician also have a key?

“A. He had.

“Q. In connection with turning off those lights, did you take any other precautions?

“A. Yes, I notified the electricians to pull the fuses to [172] No. 1 hatch and No. 5 hatch also.

“Q. And was that order carried out?

“A. It was.

“Q. Now, how long did it take to load this barley into No. 1 lower hold?

“A. May I refer to the log book again?

“Q. Yes, if it will refresh your recollection.

“A. (Referring to the log book): At 4:00 p.m. on August 17, the grain was all loaded in No. 1 hatch.

“Q. Thereafter were the hatch covers put back on?

“A. They were put on the upper 'tween deck and the main deck.

“Q. Was there a hatch cover on the No. 1 lower hold hatchway?

“A. No, just the beams were put in.

(Deposition of Rodney Palmer.)

“Q. Were those put in before the grain was poured in?

“A. The beams were left in during the operation.

“Q. And what was the purpose of leaving the beams in?

“A. For the structural strength of the vessel.

“Q. And after you completed loading this grain, did you load any other cargo at Vancouver?

“A. No, upon completion of the loading of grain at Vancouver, that is all of the cargo we loaded there.

“Q. And from that place, where did the vessel go?

“A. Shifted to the Weyerhaeuser dock at Longview, Washington.

“Q. Was any cargo loaded into No. 1 hold at Longview?

“A. Yes. There was a load of lumber that was loaded in the [173] lower 'tween deck on top of the barley.

“Q. Was there anything put between the barley and the lumber?

“A. There was dunnage installed.

“Q. Over the top of the grain?

“A. The top of the grain was dunnaged off.

“Q. Were you in the No. 1 hold during that time? No. 1 lower 'tween deck?

“A. Yes, when they started the operation.

“Q. And when was that? About what time of day?

(Deposition of Rodney Palmer.)

"A. It was on the morning of the 18th, 8:00 o'clock in the morning.

"Q. How long did your loading at Longview continue?

"A. May I refer to the log book?

"Q. If it will refresh your memory.

"A. (Referring to log book): We were at Longview at the Weyerhaeuser Mill Dock from August 18th until 12:30 on Friday, August 19.

"Q. And how long during that time did the loading of No. 1 hold continue?

"A. It was continuous through 8:00 o'clock, August 18th to 8:00 o'clock on August 19.

"Q. Who was on watch during that night?

"A. We had a relief mate on watch.

"Q. What was his name?

"A. W. C. Hardie. [174]

"Q. How was the relief mate furnished to the vessel at Longview? Does he come through the Portland hiring hall?

"A. Through the hiring hall in Portland.

"Q. Is he a member of the Masters, Mates & Pilots Union? A. He is.

"Q. Were you on duty that night?

"A. No, I wasn't."

* * *

"Q. At this time, do you recall any particular discussion with Mr. Hardie? A. No.

"Q. Would you state what the custom is with regard to instructing the night mate as to the duties

(Deposition of Rodney Palmer.)

to be performed after the regular working hours of the vessel's own deck officers?

"A. To shut off cargo that was being loaded at sunset; turn on all deck lights and the necessary lights in the hold for safety, for the safety of long-shoremen; then at daylight to turn off all the lights.

"Q. How are these instructions given to the night mate, customarily?

"A. Customarily by the Chief Officer—he has a night order book that they will leave with the night mate certain standing rules in there, that are incorporated in the [175] rules.

"Q. Was this practice followed aboard the Oregon Mail? A. Yes, it was.

"Q. And after the loading of the No. 1 hold was completed, was there any further activity at Longview before the vessel departed from that port?

"A. Yes, there was.

"Q. Would you describe generally what that activity was?

"A. Loading the deck load on the forward deck.

"Q. Was that over the No. 1 hatch?

"A. It was on the wings.

"Q. Were the hatch covers replaced on No. 1 lower 'tween deck and No. 1 main deck before that deck cargo was put on?

"A. Yes, they were.

"Q. Is that work under your supervision?

"A. Yes.

"Q. Now, when was this work completed?

(Deposition of Rodney Palmer.)

"A. May I refer to the log book?

"Q. Certainly.

"A. Referring to log book): At 5:00 o'clock that morning, August 19, the hatches were covered. At 8:00 o'clock they secured the tarpaulins that were on the hatch. Then they loaded on the deck load after that.

"Q. Would you have had occasion to look into the No. 1 hold or No. 1 hatch before the hatch cover was put back in [176] place? A. No.

"Q. Where did the vessel go after leaving Longview? A. Sailed for Vancouver, B. C.

"Q. At what time did it sail?

"A. At 12:30 p.m. on August 19th.

"Q. Can you describe the weather that prevailed during the loading at Longview?

"A. (Referring to log book): Referring to log book, 'scattered clouds, partly cloudy.' Partly cloudy and scattered clouds.

"Q. What was the weather on the voyage to Vancouver, British Columbia? A. Clear.

"Q. Were there heavy seas?

"A. No seas, various winds, varying from calm to light airs, force 1 or 2.

"Q. When did you arrive in Vancouver, British Columbia?

"A. Well, we were alongside the dock at 11:38 on Saturday, August 20.

"Q. Was that 11:38 a.m.?

"A. 11:38 a.m.

"Q. Where did you berth at Vancouver?

(Deposition of Rodney Palmer.)

"A. Terminal Dock.

"Q. What was the purpose of calling at Vancouver, British [177] Columbia?

"A. To load general cargo, consisting mostly of flour.

"Q. Was there any cargo loaded in the No. 1 hold?

"A. Yes, they loaded cargo into No. 1."

* * *

"Q. Would it assist you to refer to the stowage plan for that loading?

"A. That would be a little clearer."

* * *

Mr. Crutcher: At this point I said, "Would you please mark that as Respondent's Exhibit 'B'?" Whereupon, a stowage plan produced by Counsel was marked as Respondent's Exhibit B. Your Honor, I think it will be stipulated that the paper which we have here is that same exhibit.

Mr. Detels: It will be [178]

* * *

The Clerk: It will be marked Respondent's Exhibit No. A-5.

(A cargo plan was marked Respondent's Exhibit No. A-5 for identification.)

* * *

"Q. Now, Mr. Palmer, I am handing you a paper which has been marked for identification as Respondent's Exhibit 'B,' being marked in the upper

(Deposition of Rodney Palmer.)

right-hand corner. I will ask you whether you can identify this piece of paper?

"A. It is the Cargo plan for the Oregon Mail, Voyage 33.

"Q. Now, if it will assist you to refer to the stowage plan [179] for No. 1 hold, if you have anything you can add to your answer, you are free to do so."

Mr. Crutcher: This refers to a previous answer, your Honor, which is not included in this present deposition, or I should say in the reading of this deposition.

The Court: Kindly proceed with as few explanations as possible. Just go right along.

"A. Well, as to the cargo plan, the only cargo loaded at Vancouver was No. 1 upper 'tween deck.

"Q. And what cargo was that?

"A. A load of flour.

"Q. Where was that stowed in No. 1 upper 'tween deck?

"A. In the forward trunk, No. 1 upper 'tween deck.

"Q. At this time then would you describe again just generally the cargo that was loaded in No. 1 lower hold, No. 1 lower 'tween deck, No. 1 upper 'tween deck?

"A. No. 1 lower hold was bulk barley; the lower third of No. 1 lower 'tween deck consisted of the same cargo with lumber on top of the barley.

"It states that on top of the lumber there was

(Deposition of Rodney Palmer.)

flour loaded, a small amount of flour was loaded on top of the lumber in the lower 'tween deck.

"Now, the upper 'tween deck—"

The Court: Mr. Crutcher, proceed with Line 24 [180] if you wish to.

Mr. Detels: I would like to interpolate here. (Reading) "Mr. Crutcher, before the witness refreshes his recollection any further by means of the cargo plan, I would like to have him testify, if he knows, when and by whom it was prepared.

"Mr. Crutcher: Well, can we finish this first?

"Mr. Detels: All right.

"Q. (By Mr. Crutcher): Just to complete this, was there any cargo as of this time, and I refer now to the time when loading was completed at Vancouver, B. C., in the No. 1 upper 'tween deck?

"A. Yes, there was cargo in there from Portland, lumber, in the wings; in the forward end there was flour loaded at Portland; in the after trunk was cargo loaded at Portland, general cargo."

* * *

"Does the Chief Officer have anything to do with the preparation of the stowage plan on your west-bound voyages? A. No, he doesn't.

"Q. After the stowage plan is prepared, are you furnished with a copy of it? A. Yes. [181]

"Q. Is that a regular part of the vessel's records? A. Yes, it is.

"Q. Now, on Voyage 33 westbound, were you furnished with a copy of the stowage plan?

(Deposition of Rodney Palmer.)

“A. I was.

“Q. Did you or do you have any occasion to verify or corroborate what is shown on the stowage plan? That is, in the course of discharging, do you refer to the stowage plan to find out where the cargo is? A. Yes, I do.

“Q. Are you in a position at this time to recognize this particular copy as the copy of the stowage plan for the SS Oregon Mail, Voyage 33, west? A. Yes, it is.

“Q. By ‘this paper’ of course I am referring to a piece of paper which has been previously marked for identification as Respondent’s Exhibit ‘B,’ the paper which you have in your hand.

“After you finished—I will preface that question by, when did you finish loading at Vancouver, B. C.?

“A. Shall I refer to the log book?

“Q. If it will refresh your recollection.

“A. (Referring to log book): We left Vancouver at 10:25 p.m. on August 20, which was Saturday. [182]

“Q. While you were at Vancouver, B. C., did you receive any report that smoke had been detected in the smoke detector? A. I did.”

* * *

“Q. Now, about when was that, or at what time did you receive that report?

“A. At 6:00 p.m. on August 20th.

“Q. From whom did you receive that report?

“A. The Second Mate.

(Deposition of Rodney Palmer.)

"Q. What is his name?

"A. Norman Tomlin.

"Q. Had there been any previous reports or indication of any kind of fire on board this ship?

"A. No.

"Q. What action did you take upon receiving that report?

"A. Made a visual inspection of all acceptable cargo compartments and spaces aboard the ship."

Mr. Crutcher: Your Honor, I believe the word probably was misreported. It should read "accessible cargo compartments."

Mr. Detels: I agree with the change.

The Court: You may proceed.

"Q. Would you explain what you mean? Did you actually go [183] down into the compartments?

"A. I went into every compartment except No. 1 lower hold.

"Q. Did you go into all of them?

"A. I went into all except No. 1 lower hold.

"Q. And why didn't you go into No. 1 lower hold?

"A. The hatches, all openings were covered with frames for that hatch, for that lower hold.

"Q. Did you detect any smoke or other sign of fire in No. 1 hold?

"Mr. Detels: I must object at this time to any question using the term 'fire' directed to this witness, on the basis that there has been no testimony establishing any qualification on his part to determine whether or not there was a fire; and also on

(Deposition of Rodney Palmer.)

the basis that this question which is now being propounded is a leading question."

Mr. Crutcher: Do you repeat the objection now?

Mr. Detels: I repeat the objection at this time, your Honor.

The Court: What is your statement in response?

Mr. Crutcher: Your Honor, I believe that the terms "smoke" and "fire" are terms referring to common everyday phenomena and that certainly you don't have to be an expert in order to know whether you have determined some sign of smoke or fire. I take the position and I [184] believe this Court can take judicial notice of the fact that fire is a phenomenon of nature which is known to every man, woman and child on the earth, and that every individual is capable of recognizing a sign of a possible fire. He may misconstrue it, but at least he's entitled to—I shouldn't say he's entitled to. He would inevitably recognize it if he saw it or smelled it or heard it.

The Court: That is sufficient. Have you found any authority for your position, Mr. Detels? Is there some authority you feel controls this Court's action on this question?

Mr. Detels: Your Honor, I do not have a case in point.

The Court: Unfortunately in this instance as in almost all others without exception the Trial Court does not get the value of many times needed authorities, but that is reserved for the appellate courts usually, so we will pass it to the appellate

(Deposition of Rodney Palmer.)

court and let them have the benefit of it, but I will say in making that passing that it seems to me uncontrovertible that every human being of adult age has a conception of what fire is, and the amount of it or the adequacy of it or whether or not it is a scientific view or just a common everyday sort of homemade view is something that can be gotten at [185] by cross-examination, and the fact, if it should be developed as a fact, of varying degrees of understanding of the concept of fire in different people seems to me to go to the weight of the testimony of the witness in question rather than to the admissibility of the evidence, and so the objection is overruled.

Mr. Crutcher: I will go down then to the answer which is on Line 24.

The Court: You may proceed.

"A. No, I didn't.

"Q. Were any precautions thereafter taken with reference to this indication of smoke?

"A. We maintained a frequent inspection upon the smoke detecting system. [186]

* * *

"Q. Where did the vessel go on leaving Vancouver, B. C.?

"A. It went to Fisher's Mill at Seattle.

"Q. When did it arrive at Fisher's Mill?

"A. 7:00 o'clock in the morning on August 21st, Sunday.

"Q. Incidentally, what was the weather on the voyage from Vancouver or during the time you were

(Deposition of Rodney Palmer.)

at Vancouver and en route from Vancouver to Seattle? A. It was good; light airs.

"Q. Now, at the Fisher's Dock, what did you do? That is, what was being done aboard the vessel?

"A. We still maintained a watch on the smoke detecting system; made further examinations of the vessel and detected smoke coming from the exhaust on No. 1 king post.

"Q. And at about what time was that smoke detected?

"A. May I refresh my memory with the log book?

"Q. Certainly.

"A. (Referring to log book): At nine o'clock in the morning.

"Q. Going back for a moment to the previous day, August 20, in addition to the cargo compartments, did you also enter the forward deck house, or the No. 1 resistor house? A. Yes, I did.

"Q. Did you examine the light switch [187] panel? A. Yes, I did.

"Q. Did you find any switches turned on?

"A. The switches to No. 1 hatch were on.

"Q. Well, specifically, the lights in No. 1 hold?

"A. Yes, they were.

"Q. Is there a separate switch for the No. 1 lower hold? A. Yes.

"Q. And one for the No. 1 lower 'tween deck?

"A. Yes.

"Q. And one for the No. 1 upper 'tween deck?

"A. Yes.

(Deposition of Rodney Palmer.)

"Q. Were all of those switches on at that time?

"A. They were.

"Q. Did you look to see whether the fuses were in place? A. I did at that time, yes.

"Q. And what did you find?

"A. I found that they had been replaced.

"Q. Now, which fuses are those?

"A. The No. 1 upper 'tween deck, lower 'tween deck and lower hold.

"Q. Were there separate fuses for each of those circuits? A. There were.

"Q. What type of fuses are those?

"A. Regular cylinder type clip fuses.

"Q. How many for each switch? [188]

"A. Two for each switch.

"Mr. Crutcher: May we have these marked for identification?

"(Whereupon, four photographs produced by counsel were marked for identification as Respondent's Exhibits C, D, E, and F, respectively.)"

* * *

The Court: Then let the record show that [189] the "F" referred to at this place in this deposition on Page 26 is now in evidence as Libelant's Exhibit 1.

* * *

(Three photographs were marked Respondent's Exhibits Nos. A-6, A-7 and A-8, respectively, for identification.)

The Court: What was formerly referred to in

(Deposition of Rodney Palmer.)

this deposition as Respondent's Exhibit E is now admitted in evidence as Respondent's Exhibit A-6. What has been marked by the clerk as A-6 has previously been referred to as the letter E in this deposition. It is now received in evidence.

(Respondent's Exhibit No. A-6 for identification was admitted in evidence.)

The Court: Likewise what formerly was referred to as Exhibit D is now referred to as A-8 and is now received in evidence. [190]

(Respondent's Exhibit No. A-8 for identification was admitted in evidence.)

* * *

Mr. Crutcher: Then "C" should probably be A-7.

* * *

(Respondent's Exhibit No. A-7 for identification was admitted in evidence.)

* * *

"Q. Showing you a picture of a doorway, I will ask you whether this fairly represents the doorway to No. 1 resistor house as it was at the time of this accident?

"(Handing to witness.)

"A. Yes.

"(Reporter's Note: Above answer refers to Respondent's Exhibit 'C.') [191]

"Q. Showing you a photograph which has been marked as Respondent's Exhibit 'D,' would you

(Deposition of Rodney Palmer.)

state whether this represents the appearance of the outside of the switch panel as of this time to which we are referring? (Handing to witness.)

"A. Yes, it does.

"Mr. Detels: May I inquire, counsel?

"Mr. Crutcher: Certainly.

"Mr. Detels: In your answer, are you including the writing which appears to be in chalk on the face of the panel, or are you referring merely to the physical or structural details?

"The Witness: Referring to the physical structural details.

"Mr. Crutcher: May it be understood that the writing which appears on this should be disregarded?

"Q. (By Mr. Crutcher): Next, Mr. Palmer, referring to what has been marked for identification as Respondent's Exhibit 'E,' a photograph which appears to show switches, would you state whether or not that fairly represents the nature of the switch panel to which we are referring, again disregarding the painted markings on the panel?

"A. It does.

"Q. Last, I will ask you to refer to a photograph marked Respondent's Exhibit 'F,' (Handing to witness). [192]

"I will ask you whether the fuse plugs which appear running up and down on either side of the switch panel reflect the nature of the fuse panel to which you have referred previously? (Handing to witness.)

A. It does.

(Deposition of Rodney Palmer.)

"Mr. Detels: Is it understood, again, Counsel, that the markings are to be disregarded and that the witness is not testifying to the presence or absence of fuses in any of the receptacles?

"Mr. Crutcher: That is correct.

"Mr. Detels: That's fine.

"Q. (By Mr. Crutcher): Now, Mr. Palmer, is there a legend on the inside door of this fuse box to show which switches control which lights?

"A. There is.

"Q. Where is that legend?

"A. It is typed on a sheet of paper placed against the door.

"Q. Does a part of that piece of paper appear in the right-hand margin of the photograph marked for identification as Respondent's Exhibit 'E'?

"A. Yes, that is it.

"Q. Would you state briefly what the legend shows?

"A. Which switches control which area." [193]

* * *

"Q. Did you personally observe the smoke which was coming from the king post? A. I did.

"Q. Will you describe it as to color and density?

"A. I would say it was greyish smoke of a light to moderate density.

"Q. Now, what was done aboard the ship when this smoke was observed?

"A. We notified company officials.

"Q. At Pier 88?

(Deposition of Rodney Palmer.)

"A. Well, being Sunday, they were home. They were company officials from Pier 88.

"Q. Were any further steps taken aboard ship as far as precautions against fire were concerned?

"A. Made another inspection aboard ship and tried to locate it definitely, where the smoke was coming from.

"Q. How many compartments exhaust into the No. 1 or forward king post on the Oregon Mail?

"A. Just the one, No. 1 hatch.

"Q. All three of those compartments? [194]

"A. Yes.

"Q. Did you again make an examination of the No. 1 hold?

"A. Of the upper and lower 'tween decks.

"Q. Did you find any evidence of fire in those compartments? A. No."

* * *

"Q. Was there any smoke in the No. 1 hold?

"A. No.

"Q. Was there any way in which you could feel the deck above the No. 1 hold?

"A. No, there wasn't.

"Q. Was there any way in which you could feel it from the No. 2 hold? A. No, there wasn't.

"Q. Why was that?

"A. The deep tanks of No. 2 hold are adjacent to No. 1 lower hold. They were bunker tanks, for ship's bunkers.

"Q. Now, were there any steps taken during this

(Deposition of Rodney Palmer.)
day in an attempt to suppress fire in the No. 1 [195]
hold?"

* * *

"A. No, not on that day.

"Q. Did the smoke continue to come from the exhaust? A. It did.

"Q. Did the smoke increase in density?

"A. Well, from all appearances, it seemed to increase slightly.

"Q. What precautions were taken on the night of the 21st?

"A. All the smoke detector's unit was directed to No. 1 hold and covered through the wheelhouse and a watch was maintained on that.

"Q. What officials called on board ship during that day, do you recall?

"A. Company officials and Mr. Gow and Mr. Skewes. Alexander Gow.

"Q. Now, were there any events which changed the situation on the night of the 21st or in the early morning of the 22nd? A. No.

"Q. Did they stop working the cargo?

"A. No.

"Q. On the 22nd, what was done concerning the condition in [196] No. 1 lower hold?

"A. May I refresh my memory?

"Q. Certainly.

"A. (Referring to log book): On August 22d at 8:30 in the morning, Mr. Gow's representatives came aboard and checked the smoked detector. Then at

(Deposition of Rodney Palmer.)

9:00 o'clock that morning Mr. Gow came aboard, Captain Brady, Captain Swanson and the Master, and they all observed the concentration of air that was being brought up from No. 1 hold.

"Q. May I stop you there a moment, Mr. Palmer? Could you identify those various individuals, please? Mr. Gow is a marine surveyor, is he not?

"A. A marine surveyor from the Alexander Gow Company.

"Q. And Captain Brady?

"A. Captain Brady is a marine surveyor from National Cargo Bureau. Captain Swanson was operating manager from A.M.L.; Captain Greenwood was Port Captain for American Mail Line and the Master of the vessel was R. C. Wilmarth."

Mr. Crutcher: May it be stipulated, your Honor, that "A.M.L." as used there are the initials for the American Mail Line?

The Court: Is it so understood?

Mr. Detels: That's agreed. [197]

"Q. Thank you. Now, would you continue to describe the events during that morning?

"A. There was a concentration of air and what appeared to be smoke coming up this area. All other areas were again tried separately and there was no sign of any other disturbance coming from these areas.

"Q. Now, by 'this area' which you have just referred to, you are referring to No. 1 lower hold?

"A. Yes.

"Q. And you are talking about the concentra-

(Deposition of Rodney Palmer.)

tions of air in the smoke detector system, is that correct? A. Yes.

"Q. Now, will you proceed to describe the events during that day?

"A. It was then decided at that time, with the above-named officials, that they commenced to discharge the lumber in No. 1 lower 'tween deck so that the grain cargo in No. 1 lower hold could be observed.

"Q. Was that work started that morning?

"A. That it was.

"Q. And under whose supervision?

"A. It was under my supervision.

"Q. I might ask generally, are you the officer in charge as far as cargo on the ship is concerned?

"A. Yes." [198]

* * *

"Q. Well, anyway, as of the early evening of August 25th, the longshoremen were actually down there in the hold removing additional barley, is that correct? A. Yes.

"Q. What was the purpose of that operation?

"A. To get a clear and unobstructed view underneath the hatch coaming of the full area of the barley, to see the condition of it and to make sure there was no further damage going on.

"Q. At this time, was there any smoke issuing from the barley? A. No, there wasn't.

"Q. Was there any further crackling noise from the barley?

"A. No. After 7:00 p.m. on the evening of the

(Deposition of Rodney Palmer.)

25th, no further evidence of any smoldering or smoking or crackling noises from the hatch.

"Q. Were you down in the hold at any time when you could observe the approximate area of the charring and burning in the after end of No. 1 lower hold? Did you understand my question?

"A. No. [199]

"Q. I will rephrase it. At any time during this late afternoon or early evening were you in the No. 1 lower hold?

"A. Oh, yes. After 6:00 o'clock I went down with the sailors and then again during the evening and made quite a few trips down.

"Q. Were you able to determine the approximate area in which this smoldering had taken place?

"A. After nine o'clock in the evening, the same evening, the 25th, enough grain had been removed from all sections of the hatch so as to get a clear and unobstructed view of the total area. It was found then to be confined to just the one particular area.

"Q. Well, now, I will ask if you can describe that area. First of all, where was it with reference to the hatch?

"A. Close to the center line on the port side aft.

"Q. And about how far aft of the hatch coaming did it run?

"A. It ran back approximately—I would say four to five feet.

"Q. How far to the port side of the center line?

(Deposition of Rodney Palmer.)

"A. As far as I could see, it run about—I would say approximately 40 feet.

"Q. Now, how deep did that burning go, or could you tell?

"A. It would be hard to tell. The way the grain was stowed in there at an angle and filled up, part of it had sloughed [200] off into the hatch.

"I would venture a guess and would say it would be down about three feet, I believe I would say.

"Q. Now, was this what we would call a burned area in the vicinity of one of the cargo lights?

"A. Yes, it was.

"Q. And which light would that be?

"A. It would be the light at the after end of the No. 1 lower hold, near the center line trunk there.

"Q. Is there only one light in that area?

"A. Yes, there was only one there.

"Q. Where was that light with reference to the burned area, that is, was it in the center or to one side of it or above it?

"A. It was above it and approximately in the center.

"Q. Were there any particles of grain adhering to the light itself at the time you observed it?

"A. Yes, there were.

"Q. What was the condition of the light when you saw it, will you describe that?

"A. It was black and smoke-charred.

"Q. Was it broken?

"A. It don't believe it was.

(Deposition of Rodney Palmer.)

“Q. What was the condition of the cable that led to the light?

“A. It was black and charred, and apparently burned through [201] or perforated.

“Q. Was any of the insulation gone?

“A. I believe it was mostly the outside covering that was destroyed.

“Q. That would be called the cable covering?

“A. Yes.

“Q. Now, you mentioned a slope in the surface of the grain. At the time the grain was loaded and before these events, was there an air space aft of the hatch coaming and between the hatch coaming and the after bulkhead of No. 1 lower hold?

“A. Yes, there would be an air space.”

* * *

“Q. And how does that come about? Why doesn't the barley come up to the very top of the No. 1 hold?

“A. Well, the hatch coaming obstructed it when it was being loaded. Then it is the nature of the cargo that it settles to the after bulkhead, filtered itself through the limber holes in the hatch coaming.

“Q. Yes?

“A. And if there is cargo up above it it will continue in its natural form.

“Q. And about how deep is the air space after it settled, would you judge? [202]

I should say, after the barley settles.

(Deposition of Rodney Palmer.)

"A. Against the after bulkhead I would say approximately maybe four feet. It tapers up to the coaming at an angle where the barley filtered through the limber holes."

* * *

"Q. Did you make any investigation to determine who had put the fuses back in the No. 1 lower hold switch box?

"A. I contacted the electricians.

"Q. Well, you can answer that yes or no.

"A. Yes.

"Q. Did you determine who put them back in?

"A. Yes, I did.

"Q. Who was it?"

Mr. Detels (Reading): "I object to this question unless it is limited to knowledge within the personal knowledge of this witness and not based upon statements made to him by third persons." And I renew the objection at this time, your Honor.

The Court: There is not anything to—

Mr. Crutcher: May it please the Court—

The Court: I think that made it incumbent upon the interrogating Counsel to establish under what circumstances he obtained this information.

Mr. Crutcher: Your Honor, I believe that is [203] correct, and I have asked some foundation questions which—

The Court: But you told him, "You may answer," and the answer is the fact which Counsel objecting does not wish in the record unless it be upon the proper conditions.

(Deposition of Rodney Palmer.)

Mr. Crutcher: May I offer the foundation questions which appear on the subsequent page, Page 55, at this time?

The Court: You may.

Mr. Crutcher: Question, commencing at Line 2 on Page 55.

"Q. Under whose supervision is the handling of the light switches for deck and cargo space?

"A. The mates on watch.

"Q. And to whom are the mates on watch responsible? "A. To the Chief Mate.

"Q. Was this investigation performed in the line of your duties as Chief Mate?

"A. It was."

Mr. Crutcher: That is the foundation that I have, your Honor, for offering this statement as to the result of his investigation.

The Court: That does not necessarily establish that anybody had a duty to him to report to him, and you [204] do not cite any authority to me at this time as to why this gets by the hearsay rule. [205]

* * *

The Court: You may cross-examine.

* * *

Mr. Detels: Yes, your Honor. Beginning with Page 69, Line 20.

(Deposition of Rodney Palmer.)

Cross-Examination

"Q. At the time you made your inspection of the No. 1 lower hold at Vancouver, had the shifting boards been put in place? "A. Yes, they had.

"Q. What is the height of No. 1 lower hold from the tank top to the ceiling?

"A. Without reference to anything, I believe it is 17 to 18 [206] feet.

"Q. The inspection which you testified you made of the wiring in the hold, that would include the wiring of the fixed cargo lights that you referred to? "A. Yes.

"Q. Was that a visual inspection from where you were on the tank top? "A. Yes, it was.

"Q. So far as you know, was any other inspection made of the wiring in that hold on this voyage, prior to loading barley? "A. No."

* * *

"Q. How long were you in the hold at that time? "A. Oh, approximately 15 minutes."

* * *

"Q. Now, does the night order book which you referred to contain any instructions with respect to cargo lights?

"A. They have to be turned on at sunset and turned off at sunrise and to turn them on when you have the longshoremen working.

"Q. Incidentally, how old are you, Mr. Palmer?

"A. 34." [207]

(Deposition of Rodney Palmer.)

* * *

"Q. Did you personally remove the fuses pertaining to the No. 1 hatch, or did you instruct someone to do that?

"A. I instructed someone to do that.

"Q. And who was that? Whom did you instruct to do that? "A. The mate on watch.

"Q. Did you ever check to see whether that had been done?

"A. I personally didn't check, but the mate on watch did and they reported to me it had been done."

* * *

"Q. Well, of your personal knowledge, you don't know whether the fuses were removed or not from those pertaining to the circuits to No. 1 lower hold?

"A. I didn't personally observe them."

* * *

"Q. Mr. Palmer, showing you what has been marked as Respondent's Exhibit 'E' for identification, and directing your attention to the paint marks which appear on the surface of the panel, can you state whether or not those marks were there on August 17, 1955? "A. No.

"Q. Were there any paint marks there at that time?

"A. I believe the only paint marks were on the ends of the [208] switches, that's all."

* * *

"Q. This inspection which you made of the No.

(Deposition of Rodney Palmer.)

1 resistor house on the afternoon or evening of August 20—did you regard finding the switches on in the circuits controlling the cargo lights in the No. 1 hold as being significant?

“A. Well, I thought that it was unusual that they should be on.

“Q. Did you make any report at that time to anyone concerning the fact that the switches were on?

“A. Yes, I told the master that they had been on, that the [209] switches were on.

“Q. Did you tell him that evening?

“A. I told him as soon as I observed it.”

Mr. Detels: Proceeding now to Page 94, Line 18.

“Q. Now, was there any marking or writing upon the door of the panel which appears in Exhibit ‘D’ on August 18, 1955?

“A. There may have been, but I don’t remember it now.

“Q. You don’t recollect there was any writing on the door? “A. No.” [210]

* * *

Mr. Crutcher: Your Honor, I have a short deposition which I think we could admit in here very quickly. [212]

* * *

Mr. Crutcher: The same stipulation was made in this case as in the preceding case, or I should say in the preceding deposition. This deposition

was taken de bene esse. I'll start at Line 17 on Page 2.

DEPOSITION OF NORMAN G. McLEOD

"Q. Will you please state your full name?

"A. Norman G. McLeod.

"Q. What is your residence address?

"A. 10701 240th Place Southwest, Edmonds, Washington.

"Q. What is your occupation, Mr. McLeod?

"A. Merchant seaman.

"Q. How long have you been following the sea?

"A. Oh, about 15 or 16 years.

"Q. And how much of that time have you served as an electrician aboard ship?

"A. About 7 years.

"Q. Do you have to pass any tests or meet any particular requirements in order to classify as a marine electrician?

"A. Yes, I have a Marine Engineer's license.

"Q. Are you also licensed by the United States Coast Guard?

"A. Well, that is by the Coast Guard.

"Q. You are a member of a maritime union?

"A. Marine Firemen's Union. [213]

"Q. In 1955, did you serve aboard the SS Oregon Mail? "A. Yes.

"Q. What capacity were you aboard ship at that time? "A. Second electrician.

"Q. Particularly were you a member of the crew during Voyage 33, which was the voyage com-

(Deposition of Norman G. McLeod.)
mencing at Portland, Oregon, about August 13,
1955?

"A. I was on her in August, 1955. I don't recall
the voyage number.

"Q. What was your capacity at that time?

"A. Second electrician.

"Q. Who was the first electrician?

"A. Clerman Jones.

"Q. Do you recall the occasion when the vessel
was moored at Terminal 2 at Vancouver, Washing-
ton, on Wednesday, August 17, 1955, when they
were loading barley into the number 1 and the
number 5 holds?

"A. Well, I don't remember the exact date or
anything like that, but I know what you are re-
ferring to.

"Q. Did you receive an order from one of the
deck officers at that time concerning the fuses in
the number 1 resistor house?

"A. Yes, from one of the mates. I don't remem-
ber which one.

"Q. What was that order?

"A. To pull the fuses for the lights in number
1 hold, all of [214] the lights.

"Q. And did you personally perform that duty?

"A. Yes, I did, I pulled them all.

"Q. Specifically did you pull the fuses to num-
ber 1 lower hold at that time?

"A. Well, I pulled them for number 1 lower,
the 'tween deck and the upper hold—all three of
them.

(Deposition of Norman G. McLeod.)

“Q. Do you recall at that time that the vessel was at Vancouver, Washington?

“A. Well, I don’t remember on that, just where it was docked then.

“Q. Mr. McLeod, I wish to show you a photograph, which photograph has been marked as Respondent’s Exhibit A.”

Mr. Crutcher: I should say apart from this deposition, your Honor, Counsel and I can agree on the identity of that photograph, I think.

(Counsel confer privately.)

Mr. Crutcher: Your Honor, it will be stipulated between Counsel that the photograph referred to in the McLeod deposition as Exhibit A is the same photograph which is already in evidence in this case as Respondent’s Exhibit A-6.

“Q. Mr. McLeod, I am asking you to assume that this is a photograph taken of a switch panel in the number 1 resistor house of the Oregon Mail. I will ask you whether [215] you can identify this as the switch panel to which you went when you pulled the fuses in the number 1 resistor house?

“A. That is the only one with a sliding panel, a sliding panel up there.

“Q. I show you some paint markings which appear on the panel and I will ask you if you are familiar with those paint marks?

“A. Yes, I am. I put them on there.”

* * *

The Court: You may cross-examine. [216]

(Deposition of Norman G. McLeod.)

Mr. Detels: Yes, your Honor. Proceeding to Page 14, Line 20.

Cross-Examination

"Q. Again I will ask you whether you are able to testify positively that these markings that show on the panel which appears in the picture, Exhibit A, were made prior to this occasion at Vancouver?

"A. No, I don't know for sure whether they were made prior to it or not. I believe they were but I am not positive on it.

"Q. Would it aid your recollection in any way if you were to know that the Chief Officer had testified that to the best of his recollection they were not there at that time?

"A. No, it wouldn't change my mind in any way.

"Q. Did you personally trace out the switches to the individual lights at the time these markings were put on?

"A. The Chief Electrician and I did on most of them.

"Q. Did you check—excuse me, did you finish?

"A. (Continuing): It was the proposition of where one guy would have to stay up in the resistor house and flip off the switch and the other one would be down in the hold and yell back to him which lights went out.

"Q. Do you recall where the vessel was at the time? "A. No, I don't.

"Q. Was it at sea or would that have been done while in port?

(Deposition of Norman G. McLeod.)

"A. No, I would imagine it was at sea because we would be [217] more apt to do something like that at sea than we would in port.

"Q. Do you recall whether you checked the results that you got when you made this test against the index card that is on the back of the door?

"A. Like I say on that I believe the reason we checked it as close as we did was because we found some discrepancies in the index card on the door. That is why we made as thorough a check as we did, as to where they went, to be positive on it.

"Q. Did that test concern this particular panel?"

Mr. Crutcher: Your Honor, at this point I'll have to object to the cross-examination as extending quite far beyond anything that was contained in the direct examination of this witness.

The Court: What do you contend is the scope and substance and effect or the essence of the subject matter dealt with in the direct examination?

Mr. Crutcher: The direct examination, your Honor, we contend had simply to do with the fact that McLeod was the electrician or the second electrician at the commencement of Voyage 33 of the Oregon Mail; that he was told by one of the deck officers to turn off the fuse lights after the barley was loaded and that he did it; that he was able to identify the switch panel as [218] being one which has previously been shown here by a photograph, and that was all the testimony there was.

The Court: What have you to say?

(Deposition of Norman G. McLeod.)

Mr. Detels: The purpose of this cross-examination is to show that there were on the vessel improper or erroneous identifications of the switches in the distribution panels.

The Court: Is that the exhibit which has been referred to by the witness as "A," now in evidence as Respondent's Exhibit—

Mr. Detels: A-6.

The Court: A-6?

Mr. Crutcher: Yes, that is correct.

The Court: The objection is overruled.

Mr. Crutcher: Your Honor, I wish to point out now he's going into tests. We don't lose anything by this, but I think it's extraneous to this particular case. However, it's his business if he wants to—

The Court: The Court will have to—if anything about it is shown on that exhibit or in the words of the direct examination, the Court cannot restrict the examination in the manner stated. You may proceed. Try to be as brief as possible if there is some question about some of it being extraneous.

"Q. Did that test concern this particular panel? [219]

"A. I don't know whether it was on that particular panel. We found a couple of discrepancies throughout the panels. You have got, as I remember, you have got three different lighting panels for your five holds.

"Q. And there were discrepancies in the index cards? "A. Some of them."

(Deposition of Norman G. McLeod.)

* * *

"Q. But you can't recall which?

"A. No, I can't recall which one." [220]

* * *

Mr. Crutcher: May it please the Court, this is a deposition de bene esse taken of the witness David L. Bennett under the same stipulation as was previously entered into between Counsel for the other depositions read today, and I start on Page 3 at Line 6.

DEPOSITION OF DAVID L. BENNETT

"Q. Will you please state your full name?

"A. David L. Bennett.

"Q. And where do you live?

"A. Portland, Oregon.

"Q. What is your occupation?

"A. Marine surveyor.

"Q. Have you previously been in the merchant marine? "A. Yes, sir.

"Q. And for how long and what experience have you had briefly?

"A. Oh, approximately nineteen years' service as seaman, officer and master.

"Q. And do you presently hold a master's license? "A. Yes, I do.

"Q. Is that an unlimited license?

"A. Yes.

(Deposition of David L. Bennett.)

"Q. What trades have you served in generally?

"A. Mainly in the coastal trade and other trades, South America.

"Q. In the course of that trade, have you had occasion to [221] carry grain cargoes?

"A. Yes.

"Q. And how long have you been a marine surveyor? "A. About ten years.

"Q. Are you presently practicing as a marine surveyor? "A. Yes.

"Q. And were you so practicing during 1955?

"A. Yes.

"Q. Are you with the National Cargo Bureau?

"A. Yes.

"Q. Is that an organization of surveyors?

"A. Yes.

"Q. In that capacity, Captain, did you have occasion to go aboard the Oregon Mail in August of 1955 in connection with the loading of the cargo of barley in No. 1 hold and in No. 5 hold?

"A. Yes.

"Q. I was going to finish that—at the port of Vancouver, Washington? "A. Yes.

"Q. And in the course of that examination or survey, did you have occasion to go into the No. 1 lower hold? "A. Yes.

"Q. At this time do you recall that occasion or that inspection, I should say? [222]

"A. Well, I issued a certificate on that setup. If I could see that, perhaps I could recall. I actually

(Deposition of David L. Bennett.)

don't recall it right now because I see so many shipments.

"Mr. Crutcher: I will ask the reporter to mark this as Respondent's Exhibit A for identification."

The Court: Is it the same "A" as in the other depositions?

Mr. Crutcher: It refers to a certificate issued by the National Cargo Bureau, your Honor.

The Clerk: It will be marked Respondent's Exhibit A-9.

(A certificate of loading was marked Respondent's Exhibit No. A-9 for identification.)

The Court: Let the record show that this exhibit now marked Respondent's A-9 is the same as that referred to in this deposition of Mr. Bennett as Exhibit A. You may proceed.

"Q. Captain, I'm handing you a paper which is a photostatic copy of what purports to be a certificate of loading of National Cargo Bureau, Inc., which has been marked Respondent's Exhibit A for identification, and I will ask you to examine that and—

"A. Yes.

"Q. —and state whether you can refresh your memory from that paper? [223]

"A. Well, yes. I think I can say I remember this ship and surveying it.

"Q. First of all, can you state whether this certificate relates to the survey which you made at the time you had mentioned? A." Yes, it does.

"Q. What date was that?

(Deposition of David L. Bennett.)

"A. It was August 5, 1955.

"Q. August what?

"A. Which day? You mean the date of this certificate?

"Q. The day of the survey, yes?

"A. Well, I just surveyed this ship from time to time for several days prior to August 19, 1955.

"Q. I see. In other words, this certificate covers more than the loading of the barley?

"A. Yes.

"Q. I see. Now, with the aid of that certificate, can you recall at this time whether you had occasion to enter the No. 1 lower hold of the Oregon Mail?

"A. Yes, I did.

"Q. At that time? "A. Yes, I did.

"Q. And did you have occasion to examine the condition of the hold? "A. Yes. [224]

"Q. And was that done in your professional capacity as a marine surveyor? "A. Yes.

"Q. Did you form a conclusion as to the condition of the hold so far as its suitability for loading grain was concerned? "A. Yes.

"Q. Would you state what that opinion is?

* * *

"A. Well, I found that the hold was clean and dry and ready for the loading of a grain cargo. It was properly fitted in accordance with the rules of the National Cargo Bureau and the Coast Guard for carrying grain.

"Q. Did a part of your examination include a look at the overhead of that hold? [225]

(Deposition of David L. Bennett.)

"A. In a general sort of way, yes.

"Q. Would you have occasion to make a notation if you had found anything out of order?

"A. Well, I would require that it be corrected.

"Q. And would that be part of your function as a marine surveyor? "A. Yes."

* * *

Mr. Detels: The cross-examination beginning at Page 7, Line 20.

Cross-Examination

"Q. Captain Bennett, at whose request did you make any survey that you testified to?

"A. The American Mail Line.

"Q. And your report was made to them?

"A. Yes.

"Q. And they paid you?

"A. They don't pay me directly. They pay my firm."

Mr. Detels: Now, proceeding to Page 9, Line 17.

"Q. When you stated that you looked at the overhead in a general sort of way, you mean from a deck or tank top at the floor of the hold?

"A. Yes.

"Q. Did you make any particular observation of the cargo [226] light?

"A. Not a particular observation, no.

"Q. Or the wiring leading to the cargo lights? Well, if the wiring or lights had been defective, you wouldn't have been able to determine it from your

(Deposition of David L. Bennett.)

position, would you? "A. Very likely not.

"Q. Do you recall whether or not the cargo lights were on when you were in the No. 1 lower hold?

"A. I don't think so. I don't think they were. I don't recall whether they were on or not. I rather doubt it."

* * *

"Q. Well, then, would it be fair to say that the purpose of your survey and the fact that your certificate so far as the No. 1 lower hold is concerned relates to the cleanliness of the hold, the fact that it was dry, and that it was suitable to receive cargo in those respects?

"A. Yes, and also that the recommendations of the National Cargo Bureau in relation to carrying grain are complied with.

"Q. By that you have reference to shifting boards? [227]

"A. Shifting boards and so forth.

"Q. Anything else besides shifting boards?

"A. Feeders, and that's about the main points."

The Court: If Counsel can agree upon it I would like them to state what their agreed definition of "feeders" is.

Mr. Detels: I don't want to pose as an expert witness. I am under the impression that it is a wooden structure placed in the hold in connection with the carriage of grain to prevent movement of the grain during the motion of the ship.

The Court: Is there any objection to that?

(Deposition of David L. Bennett.)

Mr. Crutcher: No, your Honor, that is correct. [228]

* * *

JAMES C. GOW

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name?

A. James C. Gow.

Q. Where do you live, Mr. Gow?

A. Seattle.

Q. What is your occupation?

A. Marine surveyor.

Q. With what firm are you associated?

A. Alexander Gow, Incorporated.

Q. How long have you been a marine surveyor,
Mr. Gow? A. Thirty-six years.

Q. I'm sorry, I didn't hear you.

A. Thirty-six years.

Q. And how much of that time have you been in
practice with Alexander Gow, Incorporated? [233]

A. During that period.

Q. Has that been here in Seattle?

A. Yes, sir.

Q. What generally is the type of your practice
as a marine surveyor?

A. Hull, engine and cargo surveyors.

(Testimony of James C. Gow.)

Q. Do you yourself have a specialty within that field? A. Yes, sir.

Q. What is that specialty? A. Cargo.

Q. Now, Mr. Gow, during the course of your experience as a marine surveyor have you had occasion to deal with fire damage aboard ship?

A. Yes.

Q. Including fire damage to cargo?

A. Yes, sir.

Q. About how many such cases have you had, if you can recall?

A. I would say twenty-five, thirty cases.

Q. Are you familiar with the appearance and effect of fire so far as it relates to the holds of steel cargo vessels? A. Yes, sir.

Q. Mr. Gow, in 1955 were you called upon to attend the SS Oregon Mail in the month of August of that year in connection with a suspected fire in the number one lower hold? [234]

A. Yes, sir.

Q. And do you recall what day you first went to the vessel? A. Yes, the 21st of August.

Q. Who called you?

A. Captain Greenwood, port captain of the American Mail Line.

Q. And did you actually go aboard the ship on that occasion? A. Yes, sir.

Q. Where was it then moored?

A. The Fisher Flouring Mills.

Q. And did you make personal observations of the conditions aboard ship on that day?

(Testimony of James C. Gow.)

A. Yes, sir.

Q. Would you tell the Court briefly what you observed?

A. Captain Greenwood and the master of the vessel reported that there was a foreign odor in the pilothouse, and so we went into the pilothouse and noted the conditions, and it was our opinion that the odor was stronger in the area, the location of the smoke detecting system.

Q. Now, when you say "we," Mr. Gow, I want you to confine yourself to your personal observations at that time. A. I see.

Q. Was that your personal observation?

A. Yes, that was my personal observation.

Q. Can you describe to the Court what that odor was like, [235] if possible?

A. It was an odor that we couldn't definitely determine. However, in our opinion it had smoke taint, but it was not at that time heavily pronounced.

Q. Were efforts made to trace the location of that odor while you were at the vessel on Sunday, the 21st? A. Yes, sir.

Q. And just briefly what were those?

A. Well, the detecting cabinet in there takes air samples from all of the holds, and believing that it was coming from that—closer to that area, then we observed the flare tubes that are in the detecting cabinet to see whether or not we could detect smoke coming out of any flare from any hold.

Q. Well, was this an effort to determine the

(Testimony of James C. Gow.)

source of smoke from any of the compartments on the vessel?

A. It was an effort to determine whether or not our observance that we thought could be a smoke condition, or to determine where the taint was coming from or the odor that we had in the pilothouse.

Q. And what did you determine as a result of that inspection?

A. We determined that it was coming from the detection cabinet.

Q. Did you make any determination as to which hold of the vessel it was coming from? [236]

A. What was that again?

Q. I said did you make any determination as to which hold of the vessel it was coming from?

A. You couldn't—we couldn't tell from the particular flare at that time just exactly which one it was coming out of, although we felt it was—there was a slight indication it might be more pronounced from the number one hold, but it wasn't definitely determined.

Q. Incidentally, Mr. Gow, I neglected to ask you, in what capacity did you go aboard ship on that occasion?

A. As a surveyor for cargo, or to determine whether there was a fire or what condition was causing this odor in the pilothouse.

* * *

The Court: Will you wait just a minute. I would

(Testimony of James C. Gow.)

like you to say again what you determined was the locale or the place where this odor was coming from, if you know, if you made such a determination.

A. It was coming from—we decided it was coming from an area close to the detecting cabinet, which is on the after bulkhead of the pilothouse.

The Court: Where is that detecting house? [237]

A. Pardon?

The Court: You said you determined it was in an area close to the detecting house. Where is the detecting house?

A. The detecting cabinet in the pilothouse, sir.

The Court: You may inquire.

Q. (By Mr. Crutcher): Mr. Gow, is that detecting cabinet what is sometimes referred to as a smoke detector unit? A. Yes, sir.

* * *

Q. (By Mr. Crutcher): Mr. Gow, I believe in a recent answer to a question you said you were a surveyor for cargo. Did you mean that you were retained by anyone other than American Mail Line?

A. No, sir.

Q. Then to put it more definitely, were you there on behalf of American Mail Line? [238]

A. Yes, sir.

Q. Were there other surveyors in attendance during his period?

A. Yes, sir. There was my assistant, Mr. Skewes, and Captain Johnson, I believe.

Q. Who is Captain Johnson?

(Testimony of James C. Gow.)

A. He was with the San Francisco Board, or he's with the National Cargo Bureau.

Q. Was Captain Brady also there?

A. Yes, Captain Brady was there.

Q. And who is Captain Brady?

A. He is with the National Cargo Bureau.

Q. Is Mr. Brady now deceased?

A. Yes, sir.

Q. Now, was there anything definite determined on Sunday as to—

The Court: What Sunday, what date?

Mr. Crutcher: Thank you, your Honor.

Q. (By Mr. Crutcher): I'm talking about the 21st of August, 1955. While the vessel was at Fisher's dock, Seattle, was there anything to indicate that there was a fire on board or anything similar?

A. No, it wasn't determined that there was a—

The Court: It is a question of what you determined. Did you find a fire on that ship on the [239] 21st of August, is what Counsel wants to know.

A. No, sir.

Q. (By Mr. Crutcher): Now, did you return to the vessel on August 22nd? A. Yes, sir.

Q. That was a Monday, was it not?

A. Yes, sir.

Q. The vessel had shifted to Pier 88?

A. Yes, sir.

Q. Now, would you tell the Court what the conditions were on the morning of Monday, August 22nd, when you went aboard the vessel at Pier 88?

(Testimony of James C. Gow.)

A. I had the officers of the vessel keep a close observance on the smoke detecting cabinet at all times, and on Monday I again examined the detecting cabinet to determine whether or not we could detect a more pronounced condition from any of the tube flares coming into the detecting cabinet.

Q. Now, what did you observe at the smoke detecting cabinet?

A. At the smoke detecting cabinet we detected a more pronounced condition. The air sample coming out of the hold, the number one hold, was darker or heavier than it was coming out of any of the other flares.

Q. Now, did you observe any smoke from the king post at that time? [240]

A. We didn't observe any—I didn't observe any smoke from the king post at that time.

Q. Now, did you make any further observations which would lead you to conclude that there was or was not a fire in the vessel on that day?

A. May I have that question again?

Q. Yes. I'm asking you whether or not on that day, Monday, the 22nd of August, you did or did not make some determination as to whether there was a fire condition in the Oregon Mail.

A. Yes, sir.

Q. And what did you do? I mean how did you arrive at this conclusion?

A. I had my assistant, Mr. Skewes, go up to the exhaust—the king post exhaust ventilator to see

(Testimony of James C. Gow.)

whether he could detect smoke coming from the exhaust, either by sense of smell or by sense of sight, and I continued to keep an observance myself on the cabinet to see whether there was any increase of smoke in the tube flare coming from the number one hold.

Q. Well, as a result of the observations that you made and that your assistant made on Monday morning, August 22nd, did you consult with American Mail Line officials? That is to say, the master of the vessel and Captain Greenwood in particular. [241]

A. I did.

Q. And as a result of that meeting was a decision reached as to what the condition was aboard the ship?

A. Yes. We were convinced at that time that we had fire in the number one lower hold.

Mr. Detels: I move to strike that answer as not responsive.

* * *

The Court: The motion is denied.

Q. (By Mr. Crutcher): Now, Mr. Gow—

* * *

The Court: Did you on the 22nd or on any other date ever find that there was a fire aboard the ship?

A. Yes, sir.

The Court: What date did you find it?

A. On the 22nd.

The Court: You may proceed.

Q. (By Mr. Crutcher): Mr. Gow, did you

(Testimony of James C. Gow.)

thereafter consult with the master and with Captain Greenwood, the port superintendent, and with the chief officer concerning the means to be taken with respect to this fire condition?

A. Yes, sir.

Q. And were you present on the 23rd, the 24th and the 25th during the time that the cargo was discharged in the number one hold and during the time that the carbon dioxide was applied and during the time that the damaged barley was removed?

A. Yes, sir.

Q. Were you consulted in your professional capacity as a marine surveyor with respect to the steps which were taken at that time?

A. Yes, sir. [243]

Q. Now, would you explain to the Court why the carbon dioxide was applied as it was, if you know?

A. From the smoke particles from the—or the smoke samples and air samples from the number one lower hold, also from the noting of the conditions at the exhaust ventilator, we were thoroughly convinced that we had a fire in the lower hold, the number one lower hold, and the means of extinguishing that fire, the ship has a carbon dioxide system. It's normally called CO₂. It's in a CO₂ room or carbon dioxide room that can be directed to any particular hold in the vessel.

Q. Now, why was the carbon dioxide used?

A. Carbon dioxide was used for the reason that it is an inert gas, it's a heavy gas, and it has a

(Testimony of James C. Gow.)

smothering effect on a fire, a very fine smothering effect on a fire.

Q. Now, Mr. Gow, why wasn't the carbon dioxide used until the morning of August the 24th?

A. The reason for that was that the fire was in the—we had determined that the fire was coming from—the smoke was coming from the lower hold, therefore we considered—I considered that the fire was in the number one lower hold. There was cargo in the 'tween deck, which didn't give you an opportunity for access to the number one lower hold. Therefore, that cargo had to be [244] removed. Carbon dioxide is a heavier-than-air gas and it shuts off the oxygen, and at a certain percentage it won't sustain fire, fire can't be sustained under it and even human life can't. It affects a person's breathing and you suffocate. For that reason you couldn't put longshoremen into the hold to take the cargo out of the 'tween deck with a possibility of the gas leaking, because when the gas comes from—when carbon dioxide is set off and the gas comes in, it comes in under a turbulence, there's a heavy pressure under it, and you could get gas up in the 'tween deck and it would be dangerous to put men in there, and you couldn't put men in there without a gas mask.

Q. In your opinion as a professional surveyor was it necessary to remove this cargo in the upper 'tween deck of the number one hold?

A. Very definitely.

Q. Mr. Gow, after this cargo had been reached,

(Testimony of James C. Gow.)

that is the barley in the lower hold, by means of the clams, did you go down into that area?

A. Yes, after it was declared gas free.

Q. Did you take samples of the char?

A. Yes, sir.

Q. And did you preserve those samples?

A. Yes, sir. [245]

Q. Were those samples later delivered to Laucks Testing Laboratories? A. Yes, sir.

Q. Was a portion of that sample delivered to the libelant in this case or the libelant's representative? A. Yes, sir.

* * *

Q. (By Mr. Crutcher): Were you aware of the identity of the various surveyors who were in attendance at Pier 88 as well [246] as at Fisher's during the week of August 21, 1955?

A. Yes, sir.

Q. Was there a surveyor there representing the interests of the cargo underwriters?

A. Yes, sir.

Q. What was his name?

A. Captain Johnson.

Q. And who is he with?

A. He's with the National Cargo Bureau.

Q. Now, Mr. Gow, as the result of this accident and the work that was done during this week were certain expenses incurred for the purpose of salvaging damaged barley and for the purposes of extinguishing the fire? A. Yes, sir.

(Testimony of James C. Gow.)

Q. And are you familiar with those expenses?

A. Yes, sir.

Q. Do you have a memorandum before you which will enable you to tell the Court at this time what expenses were incurred? Now, the question is to be answered yes or no, Mr. Gow. A. Yes.

Q. What is that memorandum?

A. What is what?

Q. I say what is that memorandum?

A. That's my survey report. [247]

Q. Is that a report which you prepared at the time of this accident or after this loss?

A. Yes, sir.

Q. Mr. Gow, in order to save time here I'm going to ask you if there is a statement of account in that survey report which states and sets out the various expenses which were incurred?

A. Yes, sir.

Q. Where is that account found in the memorandum?

A. That is found on the last two sheets of the report.

Q. Are you referring to a survey report numbered 13366 under the letterhead of Alexander Gow, Incorporated? A. Yes, sir.

Q. And are you referring to a schedule which commences with the terms "Itemization of expense other than directly applicable to barley account fire"? A. Yes.

Q. "In #1 hold." Would you describe to the Court what the various items of expense are with-

(Testimony of James C. Gow.)

out giving the details of expense? Simply explain to the Court what these items were.

A. Item by item?

Q. Well, in a general way describe them.

A. I see. Well, there was labor of the utility men covering cars of barley unloaded from the vessel, labor of [248] dock utility men rigging boards and laying tarp, labor of the dock utility men covering the—

* * *

Q. (By Mr. Crutcher): Mr. Gow, I did not mean for you to read the individual items but to simply describe the nature of expenses which were incurred. You had railroad cars brought into Pier 88, did you not?

A. Yes, we had—I had railroad cars brought in to discharge the barley to the cars for holding and then to determine the condition of the barley for either its ability to be forwarded or to determine if it couldn't be forwarded, and—

Q. Now, what type of cars were those?

A. Those were gondola cars. [249]

Q. Are those steel cars? A. Yes.

Q. Which part of the barley which was discharged was put into those cars?

A. The burned barley was the only portion put in. It was our original—it was my original intention that we would put the barley all in cars, but there was a lack of cars, there was a shortage of cars, and therefore we had difficulty getting cars.

(Testimony of James C. Gow.)

Q. Would you describe to the Court about how much burned barley was discharged?

A. I'd have to look at my report here.

Q. Well, I just meant in terms of cars, Mr. Gow. How many railroad cars—

A. I think there were three cars. I'm taking that from memory, however.

Q. It might have been two? A. Pardon?

Q. I say it might have been two?

A. Yes, it might have been two.

Q. Now, there was other barley that was free of any taint, was there not?

A. No, the barley that we removed, we put the burned barley in the two cars, then the barley that was coming out had great possibility of smoke taint, therefore we [250] arranged to have the barley put—I arranged to have the barley put into trucks.

Q. Now let me—I think I can clarify this. The barley which was not heavily burned was put in trucks, is that correct? A. That's right.

Q. Where was that barley taken?

A. That was taken down to the state grain inspectors.

Q. And thereafter—

A. First of all for sampling by them to tell us whether or not this barley had smoke taint and what its grade would be.

Q. And then thereafter was that barley sold here?

A. Then that barley was transferred down to a storage warehouse and was subsequently sold.

(Testimony of James C. Gow.)

Q. Yes. Now, was that sold by you?

A. Yes, sir.

Q. And did you consult with the surveyor for cargo underwriters at the time of that sale?

A. Yes, definitely.

Q. Did you agree on the price? A. Yes.

Q. Now, what happened to the—well, I shouldn't put it in those terms. Would you describe the burned barley which was put in the gondola cars? [251]

A. Yes. That ranged from heavily charred and burned barley to barley that was brown in color from the action of fire or heat and also mixed with good barley, because when you would take the—to get the burned barley out, naturally you couldn't keep good barley from getting down into it, so you had portions of good barley and burned barley mixed together.

Q. There was some inevitable mixing, is that what you're saying?

A. There was no way of stopping it.

Q. Now, as a result of your survey did you make a computation as to the approximate amount of burned barley? A. Yes, sir.

Q. Did you make a memorandum of that?

A. Yes. I have it in this survey report.

Q. Will you advise the Court of approximately the amount of burned barley taken from the vessel?

A. I'll have to take that from my report. [252]

(Testimony of James C. Gow.)

Q. (By Mr. Crutcher): Mr. Gow, I wonder if you would be agreeable to having your report marked as an exhibit? A. Yes, sir.

The Court: You may do so.

The Clerk: Respondent's Exhibit No. A-10.

(A survey report was marked Respondent's Exhibit No. A-10 for identification.)

* * *

Q. (By Mr. Crutcher): Mr. Gow, I now ask you to refer to the report before you marked for identification as Respondent's Exhibit A-10, and I ask you to refer to the last pages of that report commencing with the fourth page from the end. [253]

* * *

Q. (By Mr. Crutcher): Mr. Gow, I ask you to refer to the fourth page from the end which has the caption, "Interest No. 15—Page 2." Do you see that?

A. Yes.

Q. And I ask you to refer to that portion commencing with the paragraph which is the second paragraph up starting with the words "Surveyors jointly." Do you see that? A. Yes, I do.

Q. Now I ask you to refer to that remaining matter below that on that page, the matter on the next page, the matter on the next page and the matter on the final page, and I ask you, did you personally make this report? A. Yes, sir.

Q. At the time it was prepared did you know it

(Testimony of James C. Gow.)

to be an accurate compilation of the figures which are stated in this portion of the report?

A. Yes, sir.

Q. Was this report prepared in the regular course of your business as a marine surveyor?

A. Yes, sir.

Q. And is that a true and exact copy of the memorandum which was prepared at that time by you? A. Yes, sir. [254]

* * *

Q. Were those invoices submitted to you personally? A. Yes, sir.

Q. And did you approve them for payment?

A. I did.

Q. Can you advise the Court whether the charges which were incurred in connection with this work were reasonable and necessary charges so far as the work done was concerned? A. Yes, sir.

Q. Did this relate to the discharge of the barley and the other cargo in the number one hold of the Oregon Mail commencing August 21, 1955?

A. Yes.

* * *

Q. (By Mr. Crutcher): Now, Mr. Gow, were the figures as shown in the invoices translated, or I should say transferred by you personally to this memorandum? A. Yes, sir.

Q. Do you personally know that the figures are accurate? A. Yes, sir. [257]

* * *

(Testimony of James C. Gow.)

Mr. Crutcher: Yes, your Honor. I am offering the last four pages of Mr. Gow's report starting with the third paragraph from the bottom for the sole purpose of establishing the figures, the amounts of tenders and the amounts of expenses incurred in connection with this fire, or accident, as Mr. Detels no doubt prefers to call it, and I am asking this witness merely to testify that the figures shown here are accurate, that the expenses shown here were reasonably and necessarily incurred. So far as for whose account they are, I do not ask Mr. Detels to stipulate anything as to that.

The Court: Mr. Detels has stated his position in response to the offer, and those four pages, so much as is stated in the offer, are now admitted and [259] no more, and also the admission is for the limited purpose stated by counsel making the offer. It will not be considered for any other purpose.

(Respondent's Exhibit No. A-10 for identification was admitted in evidence.)

Q. (By Mr. Crutcher): Mr. Gow, there is one other matter which I had previously omitted to ask you which I would like to ask you before you leave the stand. Did you personally go down into the cargo hold, number one lower hold, after the damaged barley had been removed?

A. Yes, sir.

Q. And did you observe the general area in which the damaged or charred barley was located or had been located? A. Yes, sir.

(Testimony of James C. Gow.)

Q. I might ask you, about when was that with reference to the time of discharge? Was there still damaged barley down there?

A. That would be on the date that we had removed the cargo from the 'tween deck and had taken sufficient barley out to get access to the lower hold.

Q. Well, now, did you personally go down in there while there was still damaged barley there?

A. Yes, sir.

Q. Could you describe to the Court the damaged area as you observed it when you went down there on that occasion? [260] And I'm referring now to the condition of the barley. Would you tell the Court what the condition of the barley was?

A. I found that when we had exposed the barley in the lower hold and had dug away sufficient barley to get back of the coaming in the port after corner, the barley was burned and it was charred and on the outer edges of it, it was discolored, but right aft of the corner of the coaming was the heaviest charred and burned condition.

* * *

Q. (By Mr. Crutcher): Mr. Gow, I'm asking you now to describe the smoke condition on the 23rd of August. That is Tuesday. Was it different than it was on the 21st? [261]

A. Very much so. The smoke coming from the flare was very dense. It was definitely determined that that was a heavy smoke.

Q. Now, at the time that the barley was uncovered did you go down into the lower hold on more

(Testimony of James C. Gow.)

than one occasion? A. Yes, sir.

Q. Would you tell the Court when you went down for the first time?

A. The first time that I went down was when the hold was declared gas free.

Q. What day was that?

A. That was on the 23rd—24th. It would be about the 24th, I believe.

Q. Was that after they had scooped the barley out?

A. Yes, after the barley had been taken out of the 'tween deck sufficient to allow access to the coaming, the lower edge of the coaming in the lower hold.

Q. Were you actually standing on barley in the lower hold on this first time that you went down there? A. Yes, sir.

Q. Would you tell the Court what the condition was as you observed it at that time?

A. At that time it—

Q. Mr. Gow, let me ask you this question: Were you standing in the square of the hatch of the lower hold at that [262] time?

A. No, I was over in the corner, in the port corner of the hatch at that time.

Q. Which corner?

A. The port corner, the port after corner.

Q. Now, would you describe to the Court what you observed at that time?

A. In digging down—

(Testimony of James C. Gow.)

Q. I'm asking for your own personal observation at that time, Mr. Gow.

A. All right. When we had the barley dug down to where the coaming was exposed, because we wanted to get under the coaming to find out what the condition was, and at that time we could hear—I could hear a definite crackling, which indicated that a fire—

Q. Was this coming from behind the coaming?

A. It was coming from behind the coaming, yes, sir.

Q. Was any smoke coming from the barley at that time?

A. Very light smoke at that time.

Q. Now—

The Court: He started to say something and you interrupted him. What else was it you said you could hear?

A. I could hear a crackling sound like you would get from anything that was burning, like sticks and so forth burning, it gives off a crackling sound.

The Court: And what day was this, again? You have said it many times, but just—was this the first day you went aboard?

A. No, sir, this was towards the—

The Court: The first day was the 21st, the second was the 22nd, and what day was it?

A. I would say this was the 24th, taking it from recollection.

Q. (By Mr. Crutcher): Now, did you recommend that any action be taken at that time with

(Testimony of James C. Gow.)

respect to this condition? A. I did.

Q. Would you tell the Court what that was?

A. I recommended that a hand line—we speak of a hand line, that's a small hand line with a nozzle—be brought down and a spray—

The Court: You mean a fire fighting hose, is that what you mean?

A. Yes, sir. However, when we speak of a hand line, it's a small hose, not a large fire hose. And recommended that the area right behind the coaming be sprayed with water but not too heavy with water, but to get a cooling effect on the barley.

Q. (By Mr. Crutcher): And was that done?

A. Yes, sir.

Q. Who did that?

A. It was done by the officers of the vessel.

Q. About how long was that water applied to that area?

A. I would say the water was applied for probably about ten or fifteen minutes.

Q. Now, thereafter, Mr. Gow, was more barley removed?

A. Yes, then more barley was removed.

Q. Now, would you, again going back to this previous question, describe to the Court very briefly the damaged area as you observed it after barley had been removed sufficiently so that you could see back behind the coaming

A. When sufficient barley was removed to permit access to look under the coaming that extends down into the hold so that you could look aft of that, the

(Testimony of James C. Gow.)

burned barley was in the area of the corner of the hatch, the port after hatch coaming,

Q. Were you able to see how deep the fire had penetrated from the surface of the barley down?

A. I estimated it. I—

Q. I'm asking you, were you able to see?

A. No, I was not able to see how deep it went at that time.

Q. Were you able to see how far aft of the corner of the hatch coaming it had gone? [265]

A. I estimated it to—

Q. No, I'm asking you if you were able to see, Mr. Gow. Could you see then conditions which would enable you to know how far aft of the hatch coaming the fire area extended?

A. Yes, I could see an area.

The Court: See what?

A. I could see an area of burned barley.

Q. (By Mr. Crutcher): Now, how far back from the hatch coaming did that area extend, to the best of your recollection?

A. To the best of my recollection that would extend back about—I'd estimate it to be about five—about seven feet.

Q. Now, were you able to see conditions which would enable you to estimate how far towards the center line the fire area extended from the corner of the aft port corner of the hatch coaming?

A. Yes. It extended towards the center line with a charred condition to the center line, and then it was discolored barley from there on to a greater—

(Testimony of James C. Gow.)

Q. I'm now asking only about the actual charred area.

A. Yes, I would say that went practically to the center line.

Q. Now, how far away from those two dimensions aft did this [266] area extend? That is, I'm asking how far did it extend out into the barley in the trunk from the edge of the hatch coaming and from the edge of the main beam running aft at the port side?

A. Into the square of the hatch?

Q. Yes—not into the square, into the after trunk.

A. You're speaking of the—it was aft of the coaming, the lip of the coaming plate.

* * *

Q. (By Mr. Crutcher): Mr. Gow, how far out into the barley did it go away from the main beam?

A. Aft?

Q. Yes. A. I would say about seven feet.

Q. And how far inboard or towards the center line from the main beam did it run, the main beam that you have previously mentioned?

A. I would say seven to ten feet.

Q. Were you able to see back in that area sufficiently to form a reasonably accurate estimate?

A. From what I was able to see, that was my opinion.

Q. Now, would you state to the Court whether there was any other charred area in the number one lower hold? [267]

(Testimony of James C. Gow.)

A. Yes, there was a charred area over on the starboard side in practically the same similar location to that of the port side, but to a very much lesser degree.

Q. Did you make any determination of the actual quantity of charred barley as distinguished from discolored barley that was removed from the ship after this accident? A. No, sir.

Q. Can you make an estimate to the Court of the amount of damaged barley which was removed?

A. I did not make an estimate of it at the time because I was going to get the weight of the barley when it would come out and be put into the cars.

Q. Well, you perhaps misunderstood my question. I'm asking now after this—I don't mean when you were down in the hold, but afterwards. Did you have any means of judging the amount of charred barley that was taken out?

A. Yes, by placing it in railway cars and getting the weight of the railway cars.

Q. Well, there was some good barley and some smoke damaged barley in there as well, was there not? A. Yes, sir.

Q. What percentage of that barley was actually burned in your judgment, or what part of it?

A. I would estimate it was about fifty per cent of it. [268]

Q. And what was the total weight of the barley removed at that time in railroad cars?

A. I'll have to take a look at the report. We

(Testimony of James C. Gow.)

estimated—I estimated the burned barley at 50,000 pounds.

Q. Now, Mr. Gow, as a result of your examination of that area, and incidentally how many times were you down in that area on that day?

A. I was continuously going in and out of it because I wanted to be able to separate the good barley from the bad barley.

Q. I'm asking now, did you have sufficient opportunity to observe the condition of the barley to form a conclusion as to whether it had been on fire?

A. Yes, sir.

Q. Would you tell the Court what your conclusion was?

A. The barley was very heavily charred and burned, and then portions of it would be brown, which was affected from the barley that had burned, and I wanted to be able to separate that.

Q. I appreciate that, Mr. Gow. I'm just asking you now to state to the Court whether in your opinion that barley was on fire.

A. Yes, sir. [269]

* * *

The Court: When, as of what time does your opinion relate?

A. It would be on the 24th, your Honor, and at the time when we had exposed the barley to be able to draw the burned barley down into the square of the hatch where we could remove it.

Mr. Crutcher: One other question, your Honor.

Q. (By Mr. Crutcher): Mr. Gow, if the records

(Testimony of James C. Gow.)

showed that the carbon dioxide was applied on the 24th and that the barley was actually dug out on the 25th—

A. Well, that would be correct. It's been quite a while ago, but the actual dates in my mind was the 24th and the 25th, but it would probably be the 25th rather than the 24th.

* * *

Cross-Examination

By Mr. Detels:

Q. Mr. Gow, you made reference to the fact that Captain Johnson of National Cargo Bureau was aboard the vessel on August 21st. Do you recall that testimony? A. Yes, sir.

Q. Do you know in whose interest he was aboard the vessel [270] at that time?

A. It's my recollection or belief that he was representing the cargo underwriter's interests.

Q. Do you have knowledge of the fact that National Cargo Bureau is regularly retained by American Mail Line in connection with the loading of cargo aboard its vessels?

A. I'll have to ask you to ask that question again. I'm having a little trouble with my right ear this week.

The Court: It will be read, Mr. Gow. Read the question, Mr. Reporter.

(The reporter read the last question.)

A. Yes, sir.

(Testimony of James C. Gow.)

Q. (By Mr. Detels): You do have knowledge of that? A. Yes, sir.

Q. Do you know then whether he was there on the 21st in connection with the services that his company regularly performs for American Mail Line?

A. I can't recall definitely that he was there on the 21st.

Q. Now, you have made reference in your testimony, Mr. Gow, to the term "fire," and I would like to have you explain to me what meaning you give to that word.

A. My opinion on fire would be anything that is burned, that has been—a fire has started and it keeps burning and it will spread and it burns whatever it comes in contact with, whatever it comes in contact with it will [271] burn.

Q. Does that necessarily involve the presence of flame?

A. It could involve flame, it could involve a glowing condition.

Q. Well, does it necessarily involve one of those two conditions to which you testified?

A. Yes, I would say so.

Q. Now, did you at any time aboard this vessel observe either glow or flame? A. No, sir.

Q. And that would include the periods when you were aboard the vessel before the CO₂ was applied in the number one lower hold and would also include the times when you made inspections in the number one lower hold after a portion of

(Testimony of James C. Gow.)

the barley had been discharged? A. Yes, sir.

Q. Mr. Gow, do you know what effect a temperature sufficient to sustain glow or flame would have on a substance such as barley? A. No, sir.

Q. You do not? A. No, sir.

Q. Well, then how did you form your conclusion by inspecting this barley that a fire had occurred?

A. Due to its condition, and further to the fact that no [272] one could see the flame or no one could see a glowing mass because you couldn't see into the compartment, and when it was exposed to where you could get near it and you could hear a crackling sound, you knew that there was some action taking place. When we wetted that down by water we knew we had put out—if there was a glowing mass or even a flame, we knew that the application of the carbon dioxide would exclude the oxygen and that fire couldn't burn.

Q. Mr. Gow, in your direct testimony you testified that by your observation of this barley in the damaged condition you determined that in your opinion there had been a fire? A. Yes, sir.

Q. And you have now testified, as I understand you, that the term "fire" necessitates the presence of flame or at least glow?

A. I would think so.

Q. And you have also testified that you have no knowledge of the effect which a temperature necessary to sustain a glow or a flame would have on a substance such as barley?

(Testimony of James C. Gow.)

A. No, not on barley.

Q. Well, then how were you able to form any conclusion as to the existence or nonexistence of a fire by your [273] observation of the damaged barley?

A. It was my opinion that the condition of the barley showed a burned condition.

Q. But you do not know what effect a flame temperature or a glow temperature has on barley?

A. I have never submitted it to a test, no, sir.

Q. Well, do you know, Mr. Gow, that the temperatures necessary to sustain a flame or a glow would necessarily reduce some of the mineral components of the barley to ash?

A. I would suppose so, yes.

Q. Now, in your observation of the barley that you observed in the hold and what was removed from the hold in a damaged condition did you observe any ash?

A. I observed what would appear to be ash in the samples that I took, yes, sir.

Q. Do you recall, Mr. Gow, that your testimony was taken upon oral deposition on April 16th?

A. Yes, sir.

Q. Of this year. And do you recall that at that time I asked you whether you had observed any ash in any of the barley aboard this vessel?

A. Yes, sir. [274]

* * *

Q. (By Mr. Detels): Page 41, Line 25. Do you find that, Mr. Gow? A. Yes, sir.

(Testimony of James C. Gow.)

Q. And the question, "Did you observe any barley which was reduced to ash?"

A. My answer was, "No."

Q. Turning again to Page 44, Line 1, my question was, "Did you observe any ash?" And your answer was, "No, sir," was it not?

A. Yes, sir.

Q. Was that your recollection of your observation of the barley at that time?

A. Yes, sir, specifically asking if it was ash, I didn't analyze it at all. I saw particles of what could be, but I had no way of knowing that it was actual ash.

Q. Well, do you have any way of knowing now?

A. No, sir.

Q. Do you have any knowledge now which you did not have at the time your deposition was taken?

A. No, sir. [275]

Q. And at the time it was taken your testimony was that you had not observed any ash?

A. Specifically as the word "ash," yes.

Q. Is that your testimony at this time?

A. Yes, sir.

Q. You did not observe any ash in any of the barley?

A. That I could specifically state was ash by actual determination of it.

Q. Well, I'm asking you whether you observed any ash in the damaged barley aboard the Oregon Mail or any barley which was taken from the number one hold of the Oregon Mail on this occasion.

(Testimony of James C. Gow.)

A. My answer to that would be this, that what I saw around the barley was in my opinion ash, but I didn't test it to find out whether it was ash or not, but it would be my opinion that it would be ash.

Q. That was not your testimony when your deposition was taken, was it, Mr. Gow?

A. No, because at that time you asked me the question of whether I had seen actual ash, and I said no.

Q. Well, I will ask you the question again. Did you see actual ash?

A. No, I didn't see actual ash. [276]

* * *

The Clerk: Libelant's Exhibit No. 2.

(A glass jar with contents was marked Libelant's Exhibit No. 2 for identification.)

Q. (By Mr. Detels): Mr. Gow, you have been handed what has been marked as Libelant's Exhibit 2, and I will ask you if you can state what that is?

A. This is barley from the Oregon Mail, a sample which I took from the burned area. [277]

* * *

Q. Based upon the inspection which you have just made of Libelant's 2, do you observe any difference or any change in the appearance of the barley contained in the jar at this time from its appearance at the time you made the delivery to which you have testified?

(Testimony of James C. Gow.)

A. From my cursory look here it looks very much the same as the other.

Q. Now, the barley which you obtained from the Oregon Mail in August, 1955, and of which you delivered a sample to the libelant on April 22nd of this year was the most severely damaged barley which you were able to obtain, was it not?

A. I took it from—I brought up a whole bucket of it and I took this out of the bucket to put it into a milk carton to keep a representative sample of it. [280]

* * *

Q. (By Mr. Detels): Well, the sample that you took was a sample of the most severely damaged barley which you observed aboard the vessel, was it not?

A. I would say it was a representative sample of the part that I brought up.

Q. Well, did you observe any barley aboard the vessel which was damaged more extensively than the barley which you preserved in this container?

A. No, I wouldn't say that the sample that I took—I would say it was representative.

Q. Well, that's not what I'm asking you, Mr. Gow. I want to know if there was any barley which you observed aboard the vessel which was in a more heavily charred or damaged condition than the sample which you preserved. A. No.

* * *

Q. Well, then the sample which you preserved

(Testimony of James C. Gow.)

was not representative of the entire quantity of barley, but it [282] was representative of that which was most severely damaged?

A. I would think so, yes.

Q. Now, you testified that you personally heard a crackling noise when you entered the hold on the afternoon of August 25th, is that correct?

A. Yes, sir.

Q. And can you state what caused that crackling noise?

A. All I can say is that the crackling sound would be the sound that I would expect would be coming from something that was burning or glowing, and having applied the carbon dioxide which would reduce it down, there still was sufficient heat and sufficient burning to necessitate something being done because the carbon dioxide was being diffused out of the hold and applying water on it was the only way to cool it down.

Q. Well, isn't it a fact that the cause of this crackling noise was the diffusion or dispersion of the CO₂ into the barley kernels?

A. No, I don't think so. That's my opinion.

Q. Your opinion is that it was not a diffusion of the CO₂?

A. It was not a diffusion of the CO₂, that's right. [283]

* * *

The Court: That will be done.

(The exhibit was handed to the witness.)

(Testimony of James C. Gow.)

Q. (By Mr. Detels): Directing your attention to the last paragraph of Page 3 of your survey report, Mr. Gow, I will ask you to read the sentence appearing approximately seven lines from the bottom beginning with the words "Air filtering" or words to that effect.

A. (Reading): Air filtering thru and diffusing the CO₂ caused scorched and blackened grain to crackle." Do you want me to read further than that?

Q. No, that's sufficient. Was that your conclusion at that time as to the cause of this crackling?

A. No, it isn't, for this reason, that the CO₂ does have a cooling effect. It's not a heavily cooling effect, but it shuts off the oxygen to whatever is burning, and it settles over there and as it diffuses, then if oxygen gets to it, why that glowing mass will come right back up again either to a heavier glow or to an actual fire, but you have reduced the carbon dioxide which was holding that down to smother it.

Q. Well, does the sentence which you just read from your [284] report state your opinion as to the cause of the crackling which you heard in the hold?

A. I still—this—

Q. I'm asking for a yes or no answer, Mr. Gow.

A. Yes.

* * *

The Court: The answer is yes. Proceed.

Q. (By Mr. Detels): Well, is it not a fact, Mr.

(Testimony of James C. Gow.)

Gow, that barley, like corn, will pop or crackle at temperatures in a range of 600 degrees?

A. That I cannot say. I'm not an expert on that.

Q. Well, then the fact that there was a noise in the nature of crackling, you're unable to state that that indicates that the barley had reached any specific temperature?

A. I can't say what the barley—that the barley reached any specific temperature because we had cooled the [285] barley down with the carbon dioxide. I don't know what the temperature was before the application of the carbon dioxide.

* * *

Q. (By Mr. Detels): Do you know, Mr. Gow, what temperature the barley had reached at any time? A. No, sir.

Q. And you have no knowledge of the temperature which will produce a crackling or a popping noise in barley? A. No, sir.

Q. Now, going back to the morning of August 21st for a moment, how was your attention directed to this situation aboard the Oregon Mail?

A. By a foreign odor in the pilothouse.

Q. No, I'm referring to the question of how you happened to go aboard the vessel on that day.

A. Oh, I was requested by the American Mail Line to go aboard.

Q. Can you state as best you can recall what request was made to you?

A. Yes. I was requested to come down to the

(Testimony of James C. Gow.)

vessel as they were noting an odor in the pilothouse that couldn't be identified, and they called me in to go down there to [286] see if we could determine what was the cause of this foreign odor in the pilothouses. [287]

* * *

Q. Was the word "fire" mentioned in connection with this request to you?

A. No, no fire was mentioned.

Q. Didn't you understand that your services were being requested in connection with determining the possibility of a fire aboard the vessel?

A. Oh, yes, definitely.

Q. That was your understanding on August 21st? A. Yes.

The Court: Does anybody have any serious contention that you whose views went into your conclusions about whether or not that was a fire and it was a fire on every day and every minute that that odor began to show?

A. Yes, sir, all we were getting was an odor from there that we couldn't—as I say, these samples come out of all the holes and you get odors and an intermingling of odors, but we were naturally—

The Court: Did you ever come to the conclusion [288] that it was a fire that was the subject of the inquiry?

A. Yes, we came to the conclusion.

The Court: When did you conclude that it was a fire?

A. On the 24th.

(Testimony of James C. Gow.)

The Court: Is it or is it not the fact as you now know the fact to be that it was at all times a fire from and after the 20th day of August, 1955?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Detels): At the time you went aboard the vessel on the morning of August 21st did you know that there was a cargo of barley in the number one lower hold?

A. Yes, because—

Q. And you isolated the odor as coming from that compartment, did you not? A. Yes, sir.

Q. And you knew that the odor was indicative that that cargo was heating, did you not?

A. It was indicative of a strong odor, but it was not definitely determined at that time as being smoke.

Q. Well, let me put it this way: The presence of odor is indicative of the fact that a substance is being heated, is it not?

A. Not necessarily, no. [289]

Q. Well, the odor that was present on the morning of the 21st then did not indicate heat to your mind?

A. It was a foreign odor that could come from interminglings of various cargo, air samples coming from various cargoes. It was my opinion or my feeling that it had a smoke odor to it, but there was nothing definite we could get from the flare to substantiate that. Therefore I had to consider that the air samples from the other holds might bring

(Testimony of James C. Gow.)

in odors from those holds from cargo that might be in there.

Q. Well, wasn't the smoke detector concentrated on the suction lines in the number one lower hold at that time?

A. No, at the time that I first saw it all of the sixteen or seventeen flares, air samples were being taken from all of those.

Q. Well, were you advised that a visual or physical inspection had been made of all spaces aboard the vessel? A. Yes, sir.

Q. Except the number one lower hold?

A. Yes, sir.

Q. Was there any doubt in your mind on the morning of August 21st that this odor was coming from the number one lower hold?

A. Yes, there was a doubt, because we hadn't been able to [290] pin point it at that day, on the 21st we hadn't pin pointed it as to exactly where it was coming from.

Q. Well, were you aware of the fact that the smoke detector could be concentrated on the suction line from a single compartment? A. Yes, sir.

Q. And that you could close the valves from all other compartments except the number one lower hold? A. Yes, sir.

Q. And in that way determine whether or not the odor was coming from this one space that was impossible to inspect? A. Yes, sir.

Q. Was that done? A. Yes, sir.

Q. Did the odor persist?

(Testimony of James C. Gow.)

A. Yes, the odor persisted.

Q. Well, didn't that satisfy you that the odor was coming from the number one lower hold?

A. Yes, it did.

Q. And didn't you identify that odor as being caused by heating of the cargo?

A. Not at that time, no, sir.

Q. What conclusion did you reach as to the cause of that odor? [291]

A. We reached the conclusion, or I reached the conclusion that the air sampling from the number one hold was giving us the odor that we were getting in the cabinet, and we watched the cabinet very carefully to try and detect any presence of smoke, because the flare in the cabinet has lights and mirrors that accentuate any air samples coming up that will show smoke.

Q. On that day did you yourself make any inspection at the king post exhaust vent from the number one hold? A. I did not personally.

Q. Was any report made to you with reference to an inspection at that point? A. Yes, sir.

Q. Was that report that the odor was detected in the exhaust vent from the number one hold?

A. Yes, sir.

Q. Now, did this odor indicate to you, or did you have in mind any other possible cause of this odor other than heating of the barley in the number one lower hold?

A. No, I didn't have any other—

Q. Well, you knew it was being heated?

(Testimony of James C. Gow.)

A. No, I didn't know it was being heated, no.

Q. Well, can you suggest any other condition which might have caused that odor to come from the number one lower hold? [292] A. No.

Q. Well, didn't you reach the conclusion at that time then that there was heating occurring in that cargo?

A. I reached the conclusion at that time that while I couldn't visually verify it, that it was smoke, that it in all probability was smoke.

Q. Resulting from heating of the cargo in the number one lower hold?

A. Yes, it could be from heating of the cargo.

Q. Did you question any of the ship's officers as to whether or not they had observed smoke prior to the morning of August 21st?

A. No, I do not believe so.

Q. From your experience as a marine surveyor, Mr. Gow, you have knowledge of the fact that heat damages grain cargo, do you not? A. Yes.

Q. Was there any question in your mind on the morning of August 21st that this cargo of barley in the number one lower hold was then being damaged?

A. I definitely was of the opinion that there was some condition in the barley in the number one lower hold that was giving us a condition in the flare from the number one hold, but without any verification as to its being smoke, because we couldn't see it, it was [293] clear and there was no—the odor could have been smoke, but it could

(Testimony of James C. Gow.)

have been an intermingling of some other odors, but to definitely pinpoint it as smoke at that particular time, I wasn't positive it was smoke.

Q. And you made no inquiry among the ship's deck officers of any observations they might have made concerning smoke?

A. No, I did not, because it wasn't necessary in my opinion because I had been called down there to observe the cabinet, and if there had been smoke coming up prior to that, why they would have said so and they would have—I would have seen it myself because the smoke would still be coming.

Q. Did you inquire as to whether they had seen smoke? A. I do not believe so, no.

Q. You didn't ask the master?

A. No, I didn't ask the master.

Q. Or the chief officer?

A. No, sir, as I recall now.

Q. Or the second officer? A. No.

Q. Now, directing your attention again, Mr. Gow, to Libelant's Exhibit 2, at the time that you made a segregation of the sample of damaged barley which you had had in your possession since August, 1955, was a [294] similar quantity delivered to Laucks Laboratory?

* * *

A. Yes, sir.

Q. (By Mr. Detels): And did Laucks Laboratory receive that sample on behalf of the respondent American Mail Line as far as you know?

(Testimony of James C. Gow.)

A. Yes, sir.

Q. And was the barley which you delivered into the custody of Laucks Laboratory representative of and similar to the barley which is contained in Libelant's Exhibit 2? A. Yes, sir. [295]

* * *

Redirect Examination

By Mr. Crutcher:

Q. Mr. Gow, it was asked of you on cross-examination whether you had observed any glow or flame in connection with this fire in the number one lower hold. My question is, were you in a position to observe the fire at any time until the carbon dioxide had been put into the hold area?

A. No, sir. There was tons of barley in the 'tween deck and there was lumber over the barley and other cargo down there and there was no way of getting down there to make a visual examination.

Q. You also testified that in your experience you knew that heat damages grain. I ask you to observe the sample which is before you as Libelant's Exhibit 2 and state to the Court whether you have ever seen any similar damage to grain by heat alone in the absence of fire.

A. No. [296]

* * *

(Testimony of James C. Gow.)

Recross-Examination

By Mr. Detels:

Q. Have you ever observed, Mr. Gow, barley which you know to have been damaged by heat in the absence of flame or glow? A. No. [297]

* * *

MARSHALL McGINITIE

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name?

A. Marshall McGinitie, M-a-r-s-h-a-l-l M-c-G-i-n-i-t-i-e.

Q. Where do you reside, Mr. McGinitie?

A. In Mount Vernon, Washington.

Q. What is your profession? A. Sir?

Q. I say what is your profession?

A. I am a marine engineer.

Q. And how long have you been a marine engineer?

A. Many years. I've been twenty-seven years in the same office.

Q. And was that practice here in Seattle?

A. Yes. McGinitie—

Q. In the course of your practice have you had occasion to conduct hull surveys aboard ships?

(Testimony of Marshall McGinitie.)

A. Many times. [298]

* * *

Q. (By Mr. Crutcher): Mr. McGinitie, in 1955, were you called upon to attend aboard the SS Oregon Mail in connection with a suspected fire aboard that ship about August? A. Yes, sir.

Q. Did you attend aboard that ship in your capacity as a hull surveyor until such time as it was determined that any possible fire was extinguished? A. Yes, sir.

Q. In the course of your service there did you have occasion to call upon Mr. Williamson to take some photographs? A. I did.

Q. Will you tell the Court where those photographs were taken? Mr. McGinitie, possibly you didn't understand my question. I meant were they taken in the number one lower hold of the Oregon Mail? A. Yes, sir.

Q. Was that after they had discharged the damaged barley from that hold?

A. That was just after we had succeeded in getting to the damage, the fire. [299]

The Court: Was it before or after some was discharged?

A. After it was discharged, all the defective grain were out.

The Court: Did Counsel hear?

Mr. Crutcher: Yes, your Honor.

Q. (By Mr. Crutcher): Now, Mr. McGinitie, were you present at the time that those photographs were taken?

(Testimony of Marshall McGinitie.)

A. I directed where they were taken.

Q. And were you present at that time?

A. I was.

Mr. Crutcher: May I have the clerk mark some photographs, your Honor?

The Court: That will be done.

The Clerk: Respondent's Exhibit A-11, Respondent's Exhibit A-12, Respondent's Exhibit A-13, Respondent's Exhibit A-14.

(Four photographs were marked Respondent's Exhibits Nos. A-11, A-12, A-13 and A-14, respectively, for identification.) [300]

* * *

HARRY ALBERT GREENWOOD

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name to the Court and spell your last name?

A. Harry Albert Geenwood, G-r-e-e-n-w-o-o-d.

Q. What is your residence, Captain?

A. 8932 Northeast 1st, Bellevue, Washington.

Q. What is your occupation?

A. Master mariner.

Q. What is your present position?

A. Superintendent of Operations for American Mail Line in Seattle.

(Testimony of Harry Albert Greenwood.)

Q. How long have you been a mariner?

A. I went to sea in 1933.

Q. And have you followed the sea or the maritime business continuously since that time?

A. Yes, sir.

Q. And when did you first receive your master's license? A. I believe it was 1946.

Q. When did you come to work for American Mail Line? A. In 1951, June of 1951.

Q. What position did you then have with the company? [306]

A. I came in as an assistant with the cargo superintendent.

Q. And thereafter did you become port superintendent?

A. Thereafter I became assistant port captain, later port captain, and ultimately superintendent of operations.

Q. What was your position in August of 1955?

A. Port captain.

Q. And were you here in Seattle?

A. I was here in Seattle, sir.

Q. Is this the headquarters of the company?

A. Yes, sir.

Q. And where is your office?

A. I am situated at Pier 88.

Q. Is that on the Seattle waterfront?

A. That is on the Seattle waterfront, at the foot of Galer Street.

* * *

Q. (By Mr. Crutcher): In August of 1955, Captain, were you called to attend at the Oregon

(Testimony of Harry Albert Greenwood.)

Mail in connection with [307] a suspected fire in number one lower hold? A. Yes, I was, sir.

Q. Do you recall approximately what time that was with relation to when the vessel got into port?

A. Well, I believe she got in, it would be sometime prior to eight o'clock that morning, and it was shortly thereafter that I received this call.

Q. Do you recall if that was Sunday, August 21?

A. Yes, it was Sunday, August 21st.

Q. From whom did you receive the call?

A. I received that call to the best of my recollection from the master.

Q. Had you previously heard of this suspected fire? A. No, sir.

Q. Now, would you tell the Court what you did after receiving the telephone call from the captain of the vessel?

A. I told him that I would proceed down to the vessel immediately, which I did. I also called Mr. Gow. I do not recall whether I called him from my home or whether I called him when I got down there, but I did call Mr. Gow.

Q. And when you got down there did you consult with Mr. Gow?

A. I know Jack Skewes of the same firm as Mr. Gow, he was [308] there, and I believe Mr. Gow was also there.

The Court: Where was the vessel at that time when you first got aboard her?

A. I believe that was at Fisher's dock. That would be Pier 25, sir.

(Testimony of Harry Albert Greenwood.)

Q. (By Mr. Crutcher): Will you explain to the Court why you called Mr. Gow?

A. Well, the report that I got from the master was of this suspicious odor which he was very leery of. My immediate reaction was to get ahold of cargo surveyors that were experienced in giving me information and looking after our interests.

Q. And then he was called to attend for American Mail Line, is that right?

A. That's right, sir.

Q. And thereafter did you consult with the captain and with Mr. Gow aboard ship?

A. Yes, sir; we did.

Q. Now, did you attend the vessel at various days up to August the 26th? A. Yes.

Q. I should rephrase that question, Captain. It's not in proper form. Did you attend the vessel after this time to which you have referred on Sunday morning? A. Yes, sir. [309]

Q. Would you tell the Court what those occasions were, briefly?

A. After I left the vessel on the 21st, which was Sunday, I made no further appearance until Monday morning, when the vessel was at 88, and from that time until the vessel sailed I was aboard many, many times at various times of the day and night.

Q. Did you call upon anyone outside of American Mail Line for assistance other than Mr. Gow?

A. Mr. McGinitie was called in.

Q. And did you employ Mr. McGinitie as a surveyor also? A. For the hull, yes.

(Testimony of Harry Albert Greenwood.)

Q. Was he also in attendance?

A. Yes, sir.

Q. How long did he continue in attendance?

A. To the best of my knowledge until the cargo was all discharged.

Q. Did you personally confer with Mr. McGinitie during that period?

A. There were various periods when there were discussions held with Mr. McGinitie.

Q. What was the nature of those discussions?

A. Well, it was to determine what course of action or what our particular problem was there. I know numerous minds are better than just one, and so it was discussed that [310] way with Jim Gow, also the master and the chief mate.

Q. And were other officials of American Mail Line involved? A. Yes.

Q. Who?

A. Captain Swanson was involved.

Q. What was his position?

A. He was at that time superintendent of operations.

Q. That's the position you now hold?

A. Yes, sir.

Q. Did you personally go down into the area from which the burned barley had been taken about August 25th or August 26th?

A. If those were the dates when the completion of discharge had been finalized, yes.

Q. How soon after they reached that area did you go down?

(Testimony of Harry Albert Greenwood.)

A. I think it was almost immediately after the discharging had been completed.

Q. Did you observe the charred barley being brought up to the deck? A. Yes; I did, sir.

Q. Did you examine it yourself?

A. Yes; I did.

Q. Will you describe to the Court the condition of the charred barley being brought up?

Mr. Detels: If the Court please, we object [311] to this as not the best evidence. There is before the Court a sample of barley which has been testified to as being representative of the most severely damaged barley taken from the hold of the vessel, and I submit that that's the best evidence.

The Court: The objection is overruled.

Q. (By Mr. Crutcher): Did you understand the—

The Court: If the cargo was in a state like that of a written instrument and everybody could read that that was the thing, the Court could see more clearly your point of view, but I cannot see why just because one person, either a bystander or an interested party, took a sample of grain cargo and another did not, or that they took two different samples, but by that circumstance alone it cannot be said that one shall be the only representative of the cargo. The Court's ruling will stand.

Mr. Crutcher: Might I add also, your Honor, that if it became the rule that we had to tender the damaged cargo into court as the best evidence of

(Testimony of Harry Albert Greenwood.)
what it looked like, it would be a very difficult thing
to try a cargo damage case.

Q. (By Mr. Crutcher): Captain Greenwood, the
question I believe was this: Would you please de-
scribe to the Court in your own words the appear-
ance of the charred [312] barley being brought up
on deck on about August 25th when the number one
lower hold of the Oregon Mail was being dis-
charged?

A. It was badly burned and very hot, and it was
brought up in buckets and there were considerable
chunks of it that were just stuck together. That's
like large pieces of carbon, you might say.

* * *

Q. (By Mr. Crutcher): Did you feel it with
your hands? A. It would be too hot to touch.

Q. Well, how did you determine that?

A. Just by standing near it. You could feel the
heat coming from it.

Q. Did you observe conditions down in the area
from which this damaged or burned barley was
being brought?

A. Yes. I noted the deckhead was badly burned.
That is, the paint that was on the deck, it was badly
peeled and burned and scorched. [313]

* * *

Q. Very well. I have just one more question,
Captain. In consulting with Mr. Gow and with Mr.
McGinitie, did they offer you advice as to the man-

(Testimony of Harry Albert Greenwood.)

ner of treating this fire condition in the number one lower hold?

A. It was done collectively, sir, with all of us that were in on the discussions. Yes, everybody had their views on it.

Q. Did you engage Captain Johnson to serve as a surveyor for American Mail Line in connection with this matter? A. No, sir.

Q. Did you know whether anyone else in American Mail Line did?

A. Not to my knowledge, sir. [315]

* * *

Cross-Examination

By Mr. Detels:

Q. Captain Greenwood, is it not a fact that American Mail Line regularly retains the National Cargo Bureau to supervise the loading of cargoes and in particular grain cargoes aboard its vessels?

A. No; we do not retain them, sir. We call them in. We are free to do that. He's not on a retainer.

Q. Well, do you have any knowledge of whether Captain Johnson was called in by American Mail Line in connection with the loading of the Oregon Mail at Seattle on Voyage 33 in August of 1955?

A. I know he was there, yes, sir.

Q. And do you not know as a fact that he was there in the capacity of a surveyor on behalf of American Mail Line on August 21st?

A. Yes, sir.

(Testimony of Harry Albert Greenwood.)

Q. He was there on behalf of American Mail Line?

A. For the whole loading operation, sir.

The Court: Who was that?

A. Captain Johnson, sir, of National Cargo Bureau.

The Court: He was—

A. He was not specifically called in that day, if that's the way your question is put to me, he [316] was not called down that day.

Q. (By Mr. Detels): He was there on that day, was he not? A. He was there on that day.

The Court: What day?

A. I believe it was the 21st, sir.

The Court: That is the first day you went aboard the ship, was it?

A. Yes, sir, but I certainly did not call Captain Johnson in.

Q. (By Mr. Detels): And he was there at that time in the capacity of a surveyor for the loading of cargo on behalf of American Mail Line, was he not?

A. Yes, I believe he was there that day, sir.

Q. For that purpose? A. Right.

The Court: What—

A. You see, we don't call him in for one specific berth. I mean it was just by chance that the ship came down from Vancouver, arrived at Fisher's and was about to load there. Well, then Captain Johnson or Captain Brady of the same firm, they're liable to be all over the waterfront and they may just hit

(Testimony of Harry Albert Greenwood.)

our ship today and then they may not. It's not that we call them down specifically for that particular job on that day. We do not call them that [317] way.

Q. (By Mr. Detels): Well, does anybody pay them for the time that they are aboard your vessels?

A. Yes. Prior to the ship going offshore we get a certificate from the National Cargo Bureau stating that in their opinion the ship's cargo has been loaded and she's in all respects secured properly for her intended voyage.

Q. And the services that they perform in connection with satisfying themselves as to the issuance of that certificate are performed for American Mail Line? A. Yes, sir.

Q. Now, when you went down to the vessel on the morning of August 21st, Captain, did you direct any questions to the ship's officers concerning their observations in connection with this situation on board the vessel?

A. I believe the only thing that was asked was how long had this odor been noticeable.

Q. And to whom did you ask that question?

A. That would have been directed to the master.

Q. Did you make any inquiry of the chief officer?

A. Yes, sir. When I say directed to the master, it would be the master and the chief officer at the same time, sir.

Q. Did you ask them what they had observed between the evening of August 20th at Vancouver,

(Testimony of Harry Albert Greenwood.)

B. C., and the time [318] you arrived on board the vessel?

A. Yes; I did, and all they could volunteer was that this odor was present.

Q. Did you ask them whether or not they had observed smoke? A. Yes; I did.

Q. What was their reply?

A. To the best of my knowledge their reply was in the negative, that there was no sign of smoke at that time.

Q. Well, are you able to testify positively at this time that you were told by the master and by the chief officer that they had not observed smoke prior to the morning of August 21st? A. Yes.

Q. Did you direct any questions to the second officer, Mr. Tomlin?

A. I do not believe so, sir, no.

Q. Now, during the period that you were aboard the vessel on the morning of August 21st was any further condition reported to you other than the observation of odor in the area of the smoke detector cabinet?

A. As I recall, the chief—one of the questions that was asked was about whether the fuses had been pulled out to the lights in the holds.

Q. I'm asking you to restrict your answer now to the morning of August 21st. [319]

A. Yes, sir. Yes, and as I recall it was related at that time that they had discovered up in Vancouver that the fuses had been put back again. This cargo of barley was loaded somewhere in the Co-

(Testimony of Harry Albert Greenwood.)

lumbia River, and it's standard procedure that the fuses are pulled out.

Q. It's your present recollection that that information was given to you on the morning of August 21st?

A. Yes; it is, sir. I just feel reasonably sure in my questioning of the master and the chief officer that that question certainly would have been one of my first ones.

Q. Captain, do you recall that your deposition was taken on oral examination in connection with this matter on April 16th of this year?

A. If—I know it was taken, sir. The exact date I'm not sure of, but I'll say yes. [320]

* * *

Q. (By Mr. Detels): Directing your attention to Line 8 on Page 12 of that deposition, Captain Greenwood, do you recall that at that time I asked you, "Have you been advised at any time up to the present that the cargo lights had been turned on in the number one hold at some time after the barley had been loaded in the number one lower hold and left burning for a period," and that you answered, "Yes, I think that came out. Now, whether it came out on that particular day, I don't recall, but somewhere along the line, as I recall, somebody had put the fuses back in again."

In the light of your testimony at the time your deposition was taken, Captain, what is your recollection at this time as to the date on which you were

(Testimony of Harry Albert Greenwood.)

advised, if you were advised, that the fuses had been removed serving the cargo lights in the number one hold of the Oregon Mail?

A. I feel reasonably sure, sir, that it was on that day, the 21st. As I said before, that would be I think one of my first questions to ask, "Were the cargo lights turned out?"

Q. The information which you received from the master at that time, did you transmit that to Mr. Gow?

A. I don't know. I assume Mr. Gow was there when this conversation was going on. [321]

Q. Were you present in the court this morning when Mr. Gow was testifying?

A. I came in late, sir. He was already on the stand.

Q. Were you present when I asked him if he had received any information on August 21st concerning this odor situation or whatever condition existed in the number one hold other than the observation of odor? Do you recall my asking him that question?

A. No, sir.

Q. Well, in any event, whether he was there at the time you received that information or not, you did not pass that information on to him?

A. I don't know, sir.

Q. What was the reason for your immediate concern about whether the fuses had been pulled from the cargo lights of the number one hold?

A. Well, it's just good seamanship, it's standard practice that when you have a cargo like that you

(Testimony of Harry Albert Greenwood.)

pull the fuses. In other words, the loading of that hatch or that compartment had been completed, there would be no further need to go in there, and that it's just good seamanship to pull your fuses to any lights.

Q. Well, when you first went aboard the vessel you concluded on the basis of the information given to you that the odor was coming from the number one lower hold, [322] did you not?

A. Yes; I think we kind of felt that that's where it was emanating from.

Q. And the fact that you inquired about the lights indicates, does it not, that you were concerned about heating of the cargo in that area?

A. I was concerned there was a condition there.

Q. Well, it was your conclusion that the odor which had been reported was caused by heating of cargo, was it not?

A. No, sir. No; I was not sure of that.

Q. Well, did the information that you received that the cargo lights had been left on enable you to form the conclusion that the cargo had been heated and that that was what was causing the odor? A. No, sir.

Q. Well, from your experience in the merchant marine, Captain, do you have knowledge of the fact that cargo lights will cause heating in grain cargoes?

A. I think it will cause a fire with any cargo where it's in proximity to your hold lights. That's always the danger.

(Testimony of Harry Albert Greenwood.)

Q. Well, they will cause heat in the first instance, will they not?

A. I don't know, sir. [323]

Q. Well, do you know whether or not you have to have heat before you can have fire?

A. No; I don't, sir.

Q. In your experience going to sea have you ever been aboard a vessel where there was any heat damage to a cargo of grain? A. No, sir.

Q. Had you ever detected this odor before that you detected aboard the vessel on the morning of August 21st? A. No, sir.

Q. You didn't know what it was at that time?

A. That is right, sir.

Q. And the information that the cargo lights had been left on in this hold full of grain didn't assist you in forming a conclusion as to what the cause of this odor was?

A. No, because the fuses had originally been pulled.

Q. Now, that is not an answer to my question, Captain. I am inquiring whether the information you received that the lights had been left on in the number one lower hold enabled you to form any conclusion as to what the cause of this odor coming from that area was? A. No, sir.

Q. Well, did you conclude on the morning of August 21st that there was no heating of the cargo in the number one [324] lower hold?

A. I had no way of determining that at all, sir.

Q. Did you conclude at that time that there was

(Testimony of Harry Albert Greenwood.)

no fire in the cargo in the number one lower hold?

A. I can't say that either, sir, no.

Q. Well, did you reach any conclusion on that morning with regard to whether or not the cargo in the number one lower hold was being damaged at that time?

A. The conclusion that was reached by all concerned was that it would take watching, and accordingly the master was instructed to watch that particular area very closely and report immediately if anything should develop.

Q. What is the purpose, if you know, if this standard practice to which you testified of removing the fuses for cargo lights in grain holds?

A. That is for any cargo, sir.

Q. It's not limited to grain cargoes?

A. No, sir, because with any cargo—you can have various types of cargo that's got dunnage, you can use paper as separation, and all that is a dangerous commodity that could create a fire, and, as I say, the pulling of fuses is not just confined to a grain cargo.

Q. Well, then with respect to cargo in general, what is the reason for the practice of removing fuses?

A. To prevent a fire, the possibility of fire. [325]

Q. It's a fact, is it not, Captain, to prevent the heating of the cargo in such a way as to lead to the possibility of a fire, is that not correct?

A. I don't—I can't say it's to prevent the heating of the cargo.

(Testimony of Harry Albert Greenwood.)

Q. Now, did you reach any conclusion as to what should be done after the inspection that you made and the information that you received on the morning of August 21st?

A. Well, it was concluded that the area would take watching and instructions were left with the master that if anything further should develop, that he would contact me immediately.

Q. Was the odor persisting from the area of the number one lower hold when you were aboard the vessel?

A. That's where it seemed to be pinpointed, sir.

Q. Did you know that the vessel was loading cargo at the time you went aboard on August 21st?

A. The reason she was at Fisher's was to load cargo, sir.

Q. And she continued to load cargo after you had made your inspection, did she not?

A. Yes, sir.

Q. And that included the loading of cargo into the number one hold of the vessel, did it not?

A. I do not recall, sir.

Q. Did you issue any instructions at that time that any [326] change be made in the vessel's plan as to the loading of cargo? A. No, sir.

Q. If you had felt that action was required you could have given that order, could you not?

A. Will you repeat the question, sir?

Q. If you had felt it desirable that the ship stop loading cargo on the morning of August 21st, you

(Testimony of Harry Albert Greenwood.)
could have given an order to that effect, is that not correct?

A. Yes; we could have stopped loading, if that's—I'm not sure how you—

Q. I'm asking whether you personally could have ordered that loading be stopped.

A. I would direct the master, yes, sir, I would direct the master and then the master in turn would direct that the loading would cease.

Q. Did you at some later time direct that loading be discontinued aboard the Oregon Mail?

A. I did not personally, no, sir.

Q. Do you know when that order was finally given?

A. It was some time the following day, Monday.

Q. That would be August—

A. The 22nd. [327]

* * *

(A cargo light was marked Respondent's Exhibit No. A-15 for identification.)

Mr. Crutcher: May it please the Court, it is agreed between Counsel that the exhibit presently being marked for identification is a facsimile or the same sort of lamp, the type of lamp which was installed in the number one lower hold of the Oregon Mail, with the [332] exception of the globe which is now screwed inside of it, and it is also stipulated that the cable which is attached to the lamp fixture is identical or in all material respects similar to the

(Testimony of Harry Albert Greenwood.)
cable which was installed on the deckhead of the
number one lower hold aft of the square of the hatch
at the time of this incident.

Mr. Detels: It is so stipulated.

* * *

(Respondent's Exhibit No. A-15 for identi-
fication was admitted in evidence.)

Mr. Crutcher: It is also agreed, your Honor,
that we will withhold the reading of three deposi-
tions which we have if the libelant would wish to
commence its rebuttal at this time.

The Court: Does the respondent rest?

Mr. Crutcher: The respondent—I should add one
more thing, your Honor. It is stipulated that Mr.
Gow would testify that the barley which was in the
number one lower hold and in the number one lower
'tween [333] deck at the time of this incident was
being carried under the bill of lading which is de-
scribed in the libel.

Reserving the right to read these additional
depositions, the respondent rests at this time.

Mr. Detels: If the Court please, there is the fur-
ther matter of the additional portions of the chief
officer's deposition which we desire to offer, but if
the Court wishes to have the live witnesses at this
time I will proceed with that.

The Court: You may reserve the right to read
the depositions later and proceed now with the
taking of oral testimony of witnesses testifying on
the stand in open court. [334]

* * *

THOMAS H. WILLIAMS

called as a witness in behalf of libelant, being first duly sworn, was examined and testified in rebuttal as follows:

Direct Examination

By Mr. Detels:

Q. Will you state your name, sir?

A. Thomas H. Williams.

* * *

(The exhibit was handed to the [335] witness.)

Q. (By Mr. Detels): Can you state, Mr. Williams, what Libelant's Exhibit 2 is?

A. It's a sample of barley taken from the—representing the cargo under discussion.

* * *

Q. Who was the person to whom you made delivery? A. Charles Smith, my partner. [336]

* * *

CHARLES V. SMITH

called as a witness in behalf of libelant, being first duly sworn, was examined and testified in rebuttal as follows:

Direct Examination

By Mr. Detels:

Q. Will you state your full name, sir?

A. Charles V. Smith.

(Testimony of Charles V. Smith.)

Q. And your address?

A. 1920-61st Avenue Northeast, Seattle 55.

Q. What is your business, Mr. Smith?

A. I'm a partner in the Northwest Laboratories.

Q. And what is the nature of that business?

A. It is a commercial testing laboratory.

Q. What educational background have you had, Mr. Smith?

A. My educational background is chemical engineering. I have two degrees from the University of Illinois.

Q. What are those degrees?

A. A Bachelor of Science and a Master of Science.

Q. How long have you been engaged in the business of chemical engineering and commercial testing?

A. Well, chemical engineering has occupied my attention since leaving school in 1934. I've been in the commercial [338] testing laboratory here in Seattle since 1946. Prior to that time I was in industry.

Q. What is the business address of Northwest Laboratories? A. 200 James Street, Seattle.

Q. Directing your attention to Libelant's Exhibit 2 which is now on the witness stand directly in front of you, can you state whether that exhibit has been in your custody? A. Yes; it has.

Q. From whom did you receive it?

A. From my partner, Thomas Williams.

Q. And approximately when was that?

(Testimony of Charles V. Smith.)

A. It would have been on about April 22nd or 23rd of this year, I believe.

Q. Was there a seal on the jar at the time the delivery was made to you?

A. Yes; there was.

Q. Have you since opened the jar?

A. I did open it, yes.

Q. Have you removed any of the barley that was in the jar at the time it was delivered to you?

A. Perhaps a half dozen kernels only.

Q. Is all the barley which remains in the jar at the present time barley which was in the jar at the time you opened it? [339]

A. Yes; it was in the jar and has never been removed.

* * *

(Libelant's Exhibit No. 2 for identification was admitted in evidence.)

* * *

(A colored temperature chart was marked Libelant's Exhibit No. 3 for identification.)

* * *

Q. (By Mr. Detels): Can you state what Libelant's Exhibit 3 for identification, is, Mr. Smith?

A. Yes. It is a reproduction in color of [340] various temperatures. Objects that are heated to various degrees emit various temperatures, and this chart shows the increase in color from black to red through the yellows and oranges as temperatures increased.

(Testimony of Charles V. Smith.)

Q. Is that chart one which you use in the regular conduct of your business?

A. Yes. This would be used in connection with pyrometric work or optical pyrometer work for measuring temperature by optical methods.

Q. Is that a standard chart in the industry?

A. Well, this type of chart is, yes, the color range.

Q. Is that particular chart one which is recognized as standard in that field?

A. Well, I believe it is, yes. This would be a close proximity, as close as can be reproduced lithographically of the color conditions of bodies that are heated.

Q. Can you state whether or not in your work you have occasion to determine the temperature of substances by reference to their color?

A. Yes; I've often done that.

Q. Is that a recognized means of determining temperature?

A. Yes; very definitely. The instrumentation field of optical pyrometers is based upon light coming to the pyrometer, the color, and the temperature is judged and controlled accordingly by the machines based on this [341] optical principle of color.

Mr. Detels: I will offer Libelant's Exhibit 3 at this time.

Mr. Crutcher: May I ask a question, your Honor?

The Court: You may do so.

Mr. Crutcher: Mr. Smith, I notice that the head-

(Testimony of Charles V. Smith.)

ing for that picture or guide or whatever it is is entitled, "Basic Guide to Ferrous Metallurgy." Is this used in the steel industry?

A. Pyrometers are used in the steel industry, that is correct. They are also used on gas furnaces. Any material that burns and gives illuminous flame or any material that radiates illuminous radiation can be judged in temperature range by color.

Mr. Crutcher: Would that include organic matter?

A. Yes. Organic matter in burning conditions would be reduced to carbon and you would have the radiation or the burning of the carbon similar to that in a gas flame or a coal flame or any other material. It all reduces itself to the simple phenomena of color radiation due to temperature.

Mr. Crutcher: That is the burning temperature of the carbon? A. That is correct. [342]

Mr. Crutcher: But not necessarily of other matter which might be burning at the same time?

A. Well, they are just awfully, awfully close. The radiation pyrometers make no distinction essentially between the type of fuels that are used. For instance, the oil burning range, the temperature of an oil burner in a furnace would be in the orange-red range, and you could judge the approximate temperature of coal from the same type of [343] color.

* * *

Mr. Crutcher: One other question. You have mentioned the examples of petroleum oil and coal, and

(Testimony of Charles V. Smith.)

most of those are carbon compounds, are they not?

A. Yes.

Mr. Crutcher: Well, I don't want to complicate this unduly, Mr. Smith, but I'm trying to determine from you whether this gauge which you have is an accurate reflection of the burning of other organic materials than those of pure carbon?

A. With the exception of the gases, all organic materials are heavily laden with carbon. Gasoline is heavily carbon. That's your petroleum. [344] Coal is heavily laden with carbon. Flour, starch, sugars, are heavily laden with carbon. The field of organic chemistry basically is the study of carbon compounds, and—

The Court: That is sufficient.

Mr. Crutcher: Yes, it is. For what it may be worth, your Honor, I have no objection to the use of this—

* * *

(Libelant's Exhibit No. 3 for identification was admitted in evidence.)

Q. (By Mr. Detels): Mr. Smith, in your experience is there a correlation between temperature and color with respect to organic material?

A. Yes. Any of your solid material, be it metal or carbon, would radiate an equivalent color for a given temperature.

Q. Can you state what temperature is required in order to produce visible light under ordinary daylight lighting conditions?

(Testimony of Charles V. Smith.)

A. Oh, in the neighborhood of 1,200 degrees would be the minimum. 1,200 degrees would produce a color which would [345] just be visible.

Q. Is that what you would refer to as a glow?

A. A dull red, a very dull red, just into the red range, just from the black into the red range.

The Court: Is that Fahrenheit?

A. Fahrenheit, your Honor, yes.

Q. (By Mr. Detels): Did you misunderstand my question, Mr. Smith? I asked you—well, I will strike the question and ask you this: At what temperature is it possible to observe a glow condition in a product such as barley?

Mr. Crutcher: Now, just a moment. Your Honor, if this is predicated upon the answer to the previous question I will object. Counsel is assuming here a glow visible in ordinary daylight. There has been no evidence that any ordinary daylight was down in this hold.

The Court: The objection is sustained.

Q. (By Mr. Detels): Now, Mr. Smith, what is the composition of barley?

A. Barley is made up of starch, sugar, cellulose, water—

The Court: Wait just a moment. Starch, sugar, cellulose, water—

A. Water, proteins, fats and ash.

The Court: How does this compare in respect to those component parts with oatmeal and wheat grain and like cereals? [346]

A. Oh, they're all in the same general class. I

(Testimony of Charles V. Smith.)

don't believe, your Honor, I could tell offhand the specific differences, but they're all predominately starch. They're more, I think, than fifty per cent starch. The proteins will run in the neighborhood of ten or fifteen per cent. Fats will vary. For instance, corn might run a little higher in fats than the barley, but in general they are very close. [347]

* * *

Q. (By Mr. Detels): Mr. Smith, have you performed experiments involving the application of heat to number two two-rowed western barley?

A. I have.

Q. Has that been in connection with this case?

A. Yes; it has.

Q. Have you observed and determined in that connection the processes or changes which occur as heat is applied to barley? A. I have.

Q. Will you state what changes or processes occur in number two two-rowed western barley when heat is applied to the barley?

A. Well, the first thing that is noticeable, at the boiling point of water, which is 212 degrees, is the driving off of the water or the distilling of the water from the barley grains. That would happen in the drying of clothes or anything. The ten per cent or thirteen per [348] cent of moisture which is normally present is driven off into water vapor. Then as temperature is increased more and more, as you approach 400 degrees you get a browning effect on the barley which is similar to the crust on bread,

(Testimony of Charles V. Smith.)

the browning of the cereal product. As you then increase the temperature to toward 500 degrees one begins to smell decidedly the parched shell of over-cooked cereal. At 550 degrees Fahrenheit, approximately, we get into decided blackening and distillation, destructive distillation or actual breaking down of the chemical structure of the barley in which acrid fumes are given off and the sugars are broken down and the starches are broken down and we get the smell of burned rags or burned cereals, and at the same time a temperature increase is given automatically by this destructive distillation which will raise the temperature still further of the barley.

Then—

* * *

Q. (By Mr. Detels): Will you state if you know, Mr. Smith, at what temperature charring or a char product is produced when heat is applied to number two two-rowed western [349] barley?

A. Well, charring will begin at about 500 or 550 degrees Fahrenheit, and charring will be produced and very thorough when you've reached 800 degrees or thereabouts.

Q. Incidentally, will you state if you know in what temperature range the commercial production of charcoal is performed?

A. It is performed within that range. Wood is a vegetation product the same as barley, it behaves quite similarly, and charcoal is produced likewise in that range of 550 to 800 degrees, the normal range of producing charcoal from wood.

(Testimony of Charles V. Smith.)

Mr. Detels: May the witness be handed Libelant's Exhibit 2? [350]

* * *

Q. (By Mr. Detels): Mr. Smith, do you have an opinion as to whether the barley contained in Libelant's Exhibit 2 has reached temperatures in excess of 800 degrees?

A. I have an opinion.

Q. On what factors do you base your opinion?

The Court: What experiences in your life, among other things?

A. Tests that I have run on a similar product, presumably the same material.

The Court: Do you mean out of this same cargo on board this Oregon Mail?

A. No, your Honor; out of number two two-rowed barley which was obtained locally, which as I understand it is the identification of this barley originally.

The Court: In that connection the Court is interested in experimentations for similar purposes and results throughout the course of his professional life.

Mr. Detels: Very well.

The Court: That is one of the things that [351] might tend to qualify him.

Mr. Detels: If the Court please, may this be marked?

The Court: It will be marked.

The Clerk: Libelant's Exhibit No. 4.

(A small jar with contents was marked Libelant's Exhibit No. 4 for identification.)

(Testimony of Charles V. Smith.)

* * *

Q. (By Mr. Detels): Will you examine Libelant's Exhibit No. 3, Mr. Smith, and state what that is, if you know?

A. Libelant's Exhibit 4 is number two two-rowed western barley which I have subjected to heat in the laboratory.

Q. Will you state how you conducted the experiment to which [352] you just testified?

A. Yes. The quantity of wheat, essentially the quantity that's contained in this bottle—

The Court: Wheat or barley?

A. Barley. I'm sorry, your Honor.

A. —was put in a little metal container and put into an oven, an electric oven which was at 600 degrees Fahrenheit, and was left for a period I think of twenty minutes, and during that time it produced the char that is shown here, there are chunks sticking together, during which time the exothermic action or the self-heating action became evident and the temperature of the material jumped automatically to around 685 degrees, and at the end of twenty minutes the char was removed from the little can and put in this bottle.

Q. (By Mr. Detels): How did you determine the maximum temperature which the barley itself reached?

A. Buried in the barley was a very fine wire thermocouple, which is just an electric thermometer, the wires of which are finer than those on this tag,

(Testimony of Charles V. Smith.)

and they were buried in it all the time during the test, and an electric instrument reads the temperature.

Q. Will you restate, Mr. Smith, the temperature of the furnace in which this experiment was conducted?

A. Yes. 600 degrees Fahrenheit was the temperature of the [353] furnace.

Q. And will you restate the maximum temperature which the barley reached inside the furnace?

A. 685 degrees.

Mr. Detels: I will offer Libelant's Exhibit 4.

Mr. Crutcher: We have no objection to it upon the basis stated.

The Court: It is admitted.

(Libelant's Exhibit No. 4 for identification was admitted in evidence.)

The Court: I think one important thing that he stated was that the barley sample was exposed to the 600 degree temperature for twenty minutes. The length of exposure is doubtless important. You may proceed.

Q. (By Mr. Detels): Mr. Smith, based on the experiment to which you just testified are you able to state what factors you based your opinion on with respect to whether or not the barley in Libelant's Exhibit 2 has reached a temperature in excess of 800 degrees?

A. Well, the absence of ash in Exhibit 2 would

(Testimony of Charles V. Smith.)

indicate that the barley had never degenerated from glowing.

The Court: That last word?

A. From glowing, or fire. There is absolutely no ash in this, no graying either in the bottom of the jar or on any of the kernels. They are still [354] shiny from the destructive distillation products which have collected on the surface and which also tends to eglomere or form the chunks that are in the bottle. That condition is identical to Exhibit No. 4 which I prepared in the oven.

Q. (By Mr. Detels): Based on the experiment which you conducted, what is your opinion with respect to the maximum temperature to which the barley in Libelant's Exhibit 2 has been subjected?

A. My judgment is that it may have been subjected to 600 degrees perhaps for a little longer time or perhaps as high as 800 degrees for a shorter period of time than I have in this bottle. It would fall in that range, in my judgment.

Q. Have you examined Libelant's Exhibit 2 for the presence of ash? A. I have.

Q. You made reference to your observation of chunks. Will you explain what significance you attach to that fact?

A. Well, barley will produce tars, broken down sugars which are gummy, and some volatile smokes, just as wood does when it is heated, and those gummy materials can be found collected on the can in which I treated this sample of barley in No. 4 or on the inside of wood chimneys, wood burning

(Testimony of Charles V. Smith.)

stoves. Those tars are binders, they will stick, [355] and those have stuck and clumped the barley in the lumps, the barley grains in lumps, in both Exhibit 2 and Exhibit 4.

Q. Now, you made reference in describing the experiment you performed to the term "destructive distillation." Will you explain what that is and at what temperature it occurs with respect to barley?

A. Well, in any vegetative product, including barley, destructive distillation begins at approximately 550 degrees Fahrenheit. Destructive distillation means simply that the chemical structure is being destroyed. It breaks down from starches and sugars and proteins into many other new chemicals which are different from the chemical structure of the barley itself. Its nature is this tarry mass to begin with and vapors and smoke. It's actually destroyed at that point and the chemical barley is converted to other chemical compounds.

Q. And is that related to the chunking or eglomeration?

A. Yes; that will cause the chunking and the eglomeration. Actually in chimneys in wood burning places where those tars are left to collect for a long period of time they will plug the chimney completely, and we have the same thing from this vegetative product.

Q. Now, if those tars and other products which are related to the chunking are exposed to heats in excess of 800 [356] degrees, what is the effect?

A. They should be reduced to perfect chars then.

(Testimony of Charles V. Smith.)

They should lose their tackiness, they should be further destructively distilled so that the only remaining part is carbon or pure char. They are no longer tacky, they are no longer resinous, they have been reduced essentially to pure carbon.

Q. Have you examined Libelant's Exhibit 2 with reference to whether or not that barley has been reduced to pure char?

A. Well, from all appearances it hasn't been reduced to pure char. These chunks that are sticking together show signs of a shiny, tarry substance coating the grains which most probably is the tarry mass that's holding it together. They are rather shiny in nature. Pure char has a dull appearance. Charcoal is dull black, flat black, is not shiny. [357]

* * *

Q. (By Mr. Detels): Mr. Smith, asking you to examine the cable which is attached to the fixture as a part of Respondent's Exhibit A-15, I'll ask you to state whether or not you have performed any experiment with identical cable?

A. Yes; I have performed experiments.

Q. That asked for a yes or no answer. Your answer is yes? A. Yes.

* * *

(A metal box with contents was marked Libelant's Exhibit No. 5 for identification.) [358]

* * *

Q. (By Mr. Detels): Handing you what has

(Testimony of Charles V. Smith.)
been marked as Libelant's Exhibit 5 for identification, Mr. Smith, can you state what that is?

A. Yes; I can state what it is. [359]

Q. Will you do so, please?

A. This is a section of the lamp cable which was delivered to me in the laboratory, a cable which is similar in construction to this Exhibit A-15, a section of which was cut approximately an inch and a quarter long, embedded in barley, the whole of which then was put into an electric furnace and set at a temperature of 650 degrees Fahrenheit.

Q. How long was the experiment carried on?

A. That was left in the furnace for twenty-about twenty-two minutes.

Q. Did you determine the maximum temperature which was reached inside of the furnace?

A. I determined the maximum temperature which was reached in the barley proper adjacent to this section of cable within the container. The furnace temperature was set and controlled at 650.

Q. What was the barley temperature?

A. The barley temperature wound up at about 725 degrees at the end of the time.

Q. Is Libelant's Exhibit 5 the cable with which you conducted that experiment?

A. That is correct; this is the section of cable which went through the furnace at 650 degrees surrounded by the number two two-rowed western barley, and the barley [360] was removed afterwards to show the cable that is in this container under Exhibit 5.

(Testimony of Charles V. Smith.)

Mr. Detels: I will offer Libelant's Exhibit 5.

Mr. Crutcher: I'm sorry, but I don't understand how this is relevant to any matter in controversy here, your Honor.

The Court: Do you object to it?

Mr. Crutcher: I do.

The Court: The objection is sustained. We have had enough experimentation in this case.

(Libelant's Exhibit No. 5 for identification was refused admission in evidence.)

* * *

Cross-Examination

By Mr. Crutcher:

Q. I'm interested in your description, Mr. Smith, of the exothermic reaction in barley.

A. Yes.

Q. I believe you indicated that when you experimented with barley in a furnace at a temperature of 600 degrees the [361] temperature jumped, you said, to about 685 degrees at the end of the twenty minutes? A. Yes.

Q. Could you account for that?

A. No. Mother Nature takes care of that. That's a natural phenomenon. I have nothing to do with that. It's described as an exothermic reaction. It's a sort of an automatic thing that occurs when you heat wood or vegetation or barley to 550 degrees. It starts to distill destructively, and with that comes an increase in temperature automatically.

(Testimony of Charles V. Smith.)

Q. How high does that exothermic, the increase in temperature from exothermic reaction continue?

A. Well, in this case it stopped at 685 degrees.

In wood distillation—

Q. Well, excuse me. A. Yes.

Q. But to continue with this particular experiment, I believe you said you took it out of the furnace at the end of twenty minutes?

A. That's correct; yes.

Q. So that so far as the tail end of the exothermic reaction is concerned you would have no knowledge based on that experiment which you described?

A. No, but it is known, well known, that that exothermic [362] reaction is rather mild in nature; that even in wood products which are heated for long periods of time, that that will not carry itself to more than seven or eight hundred degrees. They actually utilize that heat that is generated automatically as part of the charring process to minimize any fuel costs that's required in producing char, and that same thing is evidenced here.

Q. Now, regarding the comparison between the sample which has been identified, shown to you as Libelant's Exhibit 2 and the jar which you have before you as Libelant's Exhibit 4, did you consider the effect of water on the sample marked as Libelant's Exhibit 2?

A. The effect of water?

Q. Yes.

A. I didn't know there was any free water involved. I'm unaware of that. [363]

(Testimony of Charles V. Smith.)

The Court: Proceed with these depositions, if you have any depositions you wish the Court [364] to consider in connection with your case in chief, respondent's case in chief.

Mr. Crutcher: Thank you, your Honor. I will do so at this time.

The Court: The Court does not promise anyone that there will be any more evidence taken after this rebuttal of the libelant has been finished. Proceed. Surrebuttal is not received as a matter of right. You may proceed. [365]

* * *

Mr. Crutcher: I wish to offer a part of the deposition of Mr. Wallace C. Hardie dated April 26, 1958. It is my understanding that this deposition has already been opened and published, and I will commence on Page 3, Line 6.

(A copy of the deposition was handed to the Court.)

(Thereupon, the deposition of Wallace C. Hardie was read as follows.)

DEPOSITION OF WALLACE C. HARDIE

"Q. (By Mr. Crutcher): Will you please state your full name?

"A. Wallace—do you want the initial?

"Q. Yes.

"A. C. Wallace C.—that is the way I generally sign it. Wallace C. Hardie.

(Deposition of Wallace C. Hardie.)

"Q. Thank you. Where do you live, Mr. Hardie?

"A. I live at 6525 S.E. Ramona Street, Portland 6, Oregon.

"Q. What is your occupation?

"A. I am working at the present as a night and relief mate.

"Q. How long have you been going to sea?

"A. Well, I started to sea in 1911 in the Navy. First, I done three years in the Navy and four years in the Coast Guard, and since 1919 with the exception of two years I have been in the merchant marine.

"Q. And what ratings have you held in the merchant marine? [366]

"A. Well, able seaman, boatswain, and on some ships the so-called quartermaster where they delegate certain able seamen as quartermaster and third mate, second mate, and chief mate.

"Q. And when did you get your first mate's license?

"A. My original license was issued in 1924.

"Q. And when did you acquire your license as chief mate? A. I got that in 1926.

"Q. And is that license still in effect?

"A. The renewal?

"Q. They are renewed?

"A. Yes; the chief mate's license is in effect.

"Q. You have had a chief mate's license continuously since that time?

"A. I have had a chief mate's license all that time.

(Deposition of Wallace C. Hardie.)

"Q. That is what I meant. And how long have you been acting as night mate at the port of Portland?

"A. Well, I came up here in '46, but I don't know whether it was the end of '46 or whether it was the beginning of '47 when I started work as a night mate. I believe it was close to the end of the year, I know that.

"Q. Have you been working as a night mate since that time?

"A. No; I had one short session out at sea. One short period.

"Q. Aside from that, though, have you been serving as a [367] night mate or relief mate?

"A. Yes; off and on here.

"Q. Are you a member of the union?

"A. Masters, Mates and Pilots, Local 90.

"Q. And were you a member of that union in 1955? A. Yes.

"Q. Now, Mr. Hardie, I am referring now to the service that you performed on the Oregon Mail back in August of 1955, and I will ask you if you recall acting as night mate aboard the Oregon Mail during the evening watch on August 18 and during the first watch on August 19 of 1955?

"A. Yes; I recall that.

"Q. Now, do you recall that during the evening watch on August 18, someone questioned you about the lights in the No. 1 hatch?

"A. Repeat that question again.

"Q. Certainly. During the evening watch on

(Deposition of Wallace C. Hardie.)

August 18, did anything occur with relation to the lights in the No. 1 hatch? A. Yes; there was.

"Q. And would you state what that occasion was?"

Mr. Detels: If the Court please, I move to strike the following answer as hearsay.

The Court: Give me the line, please. [368]

Mr. McMullen: Page 5, Line 18, your Honor.

The Court: 19?

Mr. Detels: 18.

The Court: What he said is subject to the objection.

Mr. Crutcher: Your Honor, I offer it only for the limited purpose of stating what the occasion was and not as proof of the truth of the matter asserted.

The Court: The objection will be sustained.

Mr. Crutcher: Might I return to that, your Honor, for the purposes of an offer of proof at a later time?

The Court: Yes, you may reserve the right to later make an offer of proof.

Mr. Crutcher: Thank you.

The Court: And the sustaining of the objection was with reference to the words beginning on the 21st line with the word "and" and ending with the period in Line 22. The rest of it the Court does not sustain the objection to, if you wish to read the rest of it.

Mr. Crutcher: I understand, your Honor. I'm

(Deposition of Wallace C. Hardie.)

afraid the rest of it doesn't do much good without that. I'll go on to the next question.

"Q. Now, is this referring to the No. 1 hatch?"

Mr. Detels: I will state the same objection [369] as hearsay to the portion of that answer beginning on Page 6.

The Court: It seems to me that—

Mr. Crutcher: Your Honor, excuse me, I didn't realize this was the one in question. I'm inclined to agree with that.

The Court: The objection is sustained.

Mr. Crutcher: I will offer the following portion of this answer, your Honor, starting with Line 24:

"A. No. 1 hatch forward. At that time I was engaged in another emergency deal in the after deck and was on my way to that when this fellow approached me on the deck about this matter; and I don't know—he didn't give me the full details of just what was wrong, and I says to him—"

The Court: No, at that semicolon, the objection will be sustained at that semicolon.

Mr. Crutcher: Your Honor, I'm sorry, but I don't—

The Court: What goes after that semicolon in the first line on Page 6.

Mr. Crutcher: Your Honor, I believe that I'm entitled to show what the witness said to someone else. I was going to end the offer of proof with the word [370] "switches?" in the middle of Line 4, and I do make that offer of proof at this time to

(Deposition of Wallace C. Hardie.)
show that this witness would have testified to that
much of the question.

The Court: Do you wish to make any state-
ment?

Mr. Detels: Yes, I do, your Honor. I object
to—

The Court: Respecting offering Counsel's state-
ment that he has a right to show what the witness
testifying in his deposition said to somebody else.

Mr. Detels: Yes, I do. I object to that as hear-
say, your Honor. A statement that the witness has
made on some other occasion is hearsay.

Mr. Crutcher: Your Honor, how could anyone
ever prove what anyone else said then? If what
someone else said to me is hearsay and I can't say
what he said, certainly I'm entitled to call him to
the stand to establish what he said. I've never
heard of such a contention, and I'm offering this
only as evidence of the transaction which occurred
on that night, and I have excluded from my offer
of proof the answer which was made by the walking
boss or longshore foreman to Mr. Hardie.

The Court: I am going to ask you to stop your
other work tonight and look up some law and let
me hear you tomorrow on the authorities. [371]

Mr. Crutcher: Thank you, your Honor. I will.

The Court: I need a little review on that point,
Mr. Crutcher. It may be that you can re-educate me
on that. I do not seem to feel any familiarity with
that point of evidence which you put forward with
such a convincing statement. I just do not quite

(Deposition of Wallace C. Hardie.)

wake up to any familiarity I ever had with that proposition you advanced, and I would like you to let us know some more about that tomorrow, and likewise I would like objecting Counsel to advise what he can find regarding it.

Mr. Crutcher: Now dropping down next to Line 10 on Page 6, the question commencing:

"Q. Now, what did you do after he told you that?

"A. Well, I went down——"

The Court: Just a minute. Do you have any objection to this?

Mr. Detels: I have no objection, your Honor, to——

The Court: To what he did?

Mr. Detels: To what he did.

The Court: Although acting upon hearsay.

Mr. Detels: That is——

The Court: That is my understanding of one of the rules of evidence, that this is proper, and you may proceed. [372]

Mr. Crutcher: Thank you, your Honor.

"A. Well, I went down and got the electrician up, the electrician on watch, that was on duty.

"Q. Did you give any instructions to the electrician?

"A. Yes, I——"

Mr. Detels: I desire to state the objection that the following answer is hearsay.

The Court: The Court will not permit the reading of it until I hear from Counsel tomorrow.

(Deposition of Wallace C. Hardie.)

Mr. Crutcher: Thank you, your Honor. May I reserve the right to make my offer tomorrow on that, or I will make the offer at this time, your Honor, as long as we are at that point.

I offer to show that the witness answered in response to this question, "Yes, I informed him that there was some difficulty up there and to go up and see what he could do about it."

It is understood that the ruling on the admissibility of that is reserved until tomorrow morning.

The Court: Yes, it is. [373]

* * *

Mr. Crutcher: I now turn to Page 8 of the same deposition commencing at the top of the page:

"Q. What were they doing at the No. 1 hatch during the evening watch on August 18? [374]

* * *

"A. Well, they were part of the time preparing to load and loading lumber.

"Q. Where were they loading that lumber?

"A. In the lower 'tween deck.

"Q. And what was the need for lights at the hold there?

"A. Well, the need for lights is always—they always need lights in the holds.

"Q. For what purpose?

"A. To work the cargo and in storing the cargo, to see.

"Q. You mean for the longshoremen to see?

(Deposition of Wallace C. Hardie.)

“A. The longshoremen to see in the cargo hold down there.

“Q. Now thereafter during the morning watch on August 19, did they complete loading that lumber?

“A. That was the morning of the 19th, the day they sailed?

“Q. Yes.

“A. I believe they did, yes.

“Q. Would it help you to refer to the log book?

“A. It possibly would.

“Q. Showing you a rough, what purports to be a rough log book for the Oregon Mail Voyage 33, which has previously been marked on the back with the words ‘Libelant’s 1, Willmire,’ and ask you”—— [375]

* * *

Mr. Crutcher: I believe it will be stipulated that that is the log book now in evidence.

Mr. Detels: It will be.

“Q. I will ask you to refer to the log book entries for August 18, that is, the night entries?

“A. The night entries that I made?

“Q. Yes, and I will ask you if those are in your handwriting, beginning with this entry here at 1630?

“A. That’s my writing and then the entirety down to 2400.

“Q. Now, showing you the entries for Friday, August 19, I will ask you to refer to entries at the

(Deposition of Wallace C. Hardie.)

top of the page beginning with the figures 000 and ask you whether the entries from that time until 0800 are in your handwriting?

"A. Yes, that is all in my writing up till five o'clock there.

"Q. Well, you will notice an entry at [376] 0800?

"A. Up to eight o'clock. I didn't notice it. Yeah, up to and including that one at the time I was relieved.

"Q. The witness here is referring to the entry at 0800. The night mate is relieved by the ship's officers. Now, Mr. Hardie, I will ask you by referring to these entries for the early morning of August 19 if you can state whether or not the longshoremen completed the loading of lumber during that watch?

"A. Well, this entry is at 0400, 0430. That would be four-thirty in the morning, a.m. that they finished loading the lumber. One and No. 5. I have got the lower holds there, but that probably refers to No. 5. It couldn't possibly refer to No. 1.

"Q. Would that correctly be No. 1 lower 'tween deck?

"A. Yes, it would be.

"Q. Does it say where it started?

"A. When they started, at seven o'clock the night before. I believe so.

"Q. But I am only concerned now, Mr. Hardie, with the concluding of the work.

"A. All right.

(Deposition of Wallace C. Hardie.)

"Q. Now, having examined these log entries, do you recall whether they did finish loading the lumber during your watch in the early morning hours?

"A. Well, they finished as far as my watch was concerned at [377] four or four-thirty in the morning because at five o'clock is their knocking off time. Now, whether the day gangs came back there and went in there again and done anything down in that hold, I don't know. That would be in somebody else's entries.

"Q. I call your attention to an entry at 0430 which reads in part, 'No. 1—'

"A. Yes.

"Q. 'No. 1 gang covered 'tween deck and replaced shoring.'

"A. Yes.

"Q. Would that indicate that they had completed—

"A. That would indicate to me that they had certainly finished then when they put the shoring back up and everything. It was finished there."

Mr. Crutcher: Turning next to Page 11, Line 17.

"Q. Do you remember now at this time whether on the morning of August 19 you either turned off the lights at the No. 1 hatch or had someone else do that?

"A. Whatever lights was turned off, I turned them off.

"Q. Well, what I am asking now is whether you at this time remember that?

(Deposition of Wallace C. Hardie.)

"A. Yes.

"Q. And did you turn them off yourself?

"A. Yes. I turned off what is termed the deck lights, that is the deck lights including whatever the cluster lights [378] that they use, the portable cluster lights. Those are the ones that I turned off, and in doing that I turned the mast lights off in the locker. Those are either turned off at the individual switches outside, or we unscrew the plugs and pull them out.

"Q. Yes. Were you aware at that time that in addition to the cluster lights there may have been lights in the hold which were on?"

Mr. Detels: I'll object to that question as leading, and in addition it is asserting facts on which there has been no evidence or testimony.

Mr. Crutcher: May it please the Court, I'm here referring to whether the witness was aware of any such fact, I'm not asserting it as a fact.

The Court: The objection is overruled.

"Q. You may answer that. Maybe you would like to have him repeat the question?

"A. Yes, if I could have that read back, please.

"(Whereupon the reporter read the question.)

"A. Lights on in the hold—it should have been.

"Q. Were you aware that there was barley stowed in the No. 1 lower hold at the beginning of your watch on August the 18th?

"A. Yes.

(Deposition of Wallace C. Hardie.)

“Q. Were you aware that the fuses had been pulled in the [379] lights for that hold?

“A. No. In that particular instance, I wasn’t aware of it at the time.

“Q. When you went off watch, did you have any knowledge that there were lights on in any of the No. 1 holds?

“A. No, sir.”

Mr. Crutcher: On Page 21, which is cross-examination, on Line 11:

“Q. Well, you yourself don’t know whether the portable cluster lights were working on the evening of August 18?

“A. Oh, yes, they was bound to have been working, or I would have been notified sooner.

“Q. Well, at the time he—”

Mr. Crutcher: I believe, your Honor, this is referring to the stevedore foreman.

“Q. ——notified you of this condition, do you know whether or not the cluster lights were then working? I would like you to tell me if you can—not what you assume, but whether or not you know whether the lights were then working?

“A. Well, they were working. Now, when he notified me, apparently something was wrong. One of them wasn’t working or two of them had went out or something that had went out. Apparently, that was my idea. When I couldn’t put the switches on, I got an electrician to [380] fix it.”

Mr. Detels: I will move to strike that answer as

(Deposition of Wallace C. Hardie.)

being speculative and not based on knowledge of the witness.

Mr. Crutcher: It appears to me that the first sentence of the answer is responsive.

The Court: The objection is overruled. The answer will stand.

"Q. Did he ask you to fix the cluster lights or have them fixed?

"A. He said they——"

Mr. Detels: I'll object to that as calling for hearsay.

The Court: That objection is sustained.

Mr. Crutcher: Your Honor, may I reserve the right to argue that in the morning?

The Court: You may. There will be no argument about it. If you want to make an offer of proof, you may do so.

Mr. Crutcher: I would like to do so at this time, your Honor. I offer——

The Court: The first sentence is subject to the objection, but the next two do not seem to be, and the objection goes and is sustained as to the last sentence, "He said" and so forth. The two [381] sentences beginning with "He said."

Mr. Crutcher: I believe your Honor's ruling is correct, and I will offer only the center sentences. I accept that ruling.

The Court: The "He said" sentences are objected to and the objection is sustained. You may proceed.

Mr. Crutcher: Thank you, your Honor.

(Deposition of Wallace C. Hardie.)

"Q. Did you yourself enter the No. 1 resistor house at the time that this request was first made to you?

"A. No, sir."

Mr. Crutcher: I will next go down to Line 13.

"Q. Did you enter the resistor house at any time during that watch from four in the afternoon until eight o'clock the following morning?

"A. I entered there and put the deck lights, the mast lights and these receptacle places and switches on.

"Q. You turned them on?

"A. Well, that's what we do. We turn the lights on, yes, at sundown. That is generally before the longshoremen, just before they come.

"Q. And you personally did that?

"A. Yes."

Mr. Crutcher: I now turn, your Honor, to Page 36, Line 20, commencing with the question: [382]

"Q. Now, is there a customary procedure with relation to the turning off of the lights in the holds which are loaded with grain at this port?

"A. Fixed lights?

"Q. Well, either fixed or cluster?

"A. Fixed lights, yes, but other lights there would be none down there.

"Q. All right now, with reference to fixed cargo lights in holds which are loaded with grain, can you say what the customary procedure is?

"A. They remove the fuses.

"Q. What is the purpose of removing the fuses?

(Deposition of Wallace C. Hardie.)

"A. So that nobody can put the lights on in there. Nobody could accidentally put a switch on and throw a light on in there."

"Q. And were you acquainted with that custom in August of 1955?

"A. Yes." [383]

* * *

At the conclusion of the trial yesterday, your Honor, we had been reading from the deposition of Mr. Hardie, and I believe that Mr. Detels was to offer cross-examination of Mr. Hardie to complete the reading of that deposition. Is that correct?

* * *

Mr. Detels: No cross-examination.

The Court: Is there anything else, Mr. Crutcher? If there is no cross, how can there be any redirect?

Mr. Crutcher: There is no redirect, your Honor. Your Honor, just at the moment I'm reading those three portions which constituted an offer of proof in Mr. Hardie's deposition, the ruling upon which was [389] reserved until this morning.

The Court: Yes.

* * *

Mr. Crutcher: On Page 5, your Honor, excuse me. The question was, "Now, is this referring to the No. 1 hatch?" and the answer consists of about five sentences, your Honor.

The Court: One of the answers objected to, as

(Deposition of Wallace C. Hardie.)

I recall, was in Line 21 beginning with the word "and," "and said" and so forth.

Mr. Crutcher: Yes, your Honor. I'll go back to that question first to take it in order. I would like to offer the first sentence of the answer, which excludes the remark—

The Court: Wait just a minute. Let us clarify this. [390]

Mr. Crutcher: Yes, your Honor.

The Court: Do you withdraw your offer of the witness' statement that he said to somebody or that they said something to him?

Mr. Crutcher: That somebody else said something to the witness.

The Court: There is no trouble about that. Of course the Court and all connected with the case readily agree that that is hearsay, is it not?

Mr. Crutcher: Insofar as it is offered as proof of the truth of what was said.

The Court: The Court yesterday ruled it out for any and all purposes on the ground that it is hearsay, and the Court adheres to that ruling now, but the question left for consideration is whether or not what this witness now testifying now on the stand, so to speak, and giving his deposition, said that he said on a former occasion when somebody was not there.

Mr. Crutcher: That is correct, your Honor. Referring first to the question commencing between Lines 17 and 18 on Page 5, "And would you state

(Deposition of Wallace C. Hardie.)

what that occasion was?" I wish at this time to offer the first sentence of the answer.

The Court: Is there any objection?

Mr. Detels: No objection, your Honor. [391]

The Court: That is admitted.

Mr. Crutcher: May I read the answer then, your Honor?

(Reading): "Well, in my period of duty that night, I can't recall the exact time, one of the foremen come to me on the deck of the vessel."

The next question, "Now, is this referring to the No. 1 hatch?"

The answer to that one, your Honor—

The Court: Has it already been read?

Mr. Crutcher: —has already been offered.

The Court: Has it already been received?

Mr. Crutcher: It has—no, it has not been received. The objection was made to the statement by Mr. Hardie, the witness who was then testifying.

The Court: Is there any objection to this now, since the objectionable matter in the preceding answer has been excluded and now this refers in effect only to the matter admitted?

Mr. Detels: If the Court please, I do object to the portion of that answer beginning on Line 1 with the word "and" and continuing to Line 6.

The Court: That is at the top of Page 6?

Mr. Detels: Yes, your Honor.

The Court: Read the answer down to [392] that point, Mr. Crutcher.

(Deposition of Wallace C. Hardie.)

Mr. Crutcher: May I read the parts which I offer?

The Court: Down to that point, if you wish to go that far.

Mr. Crutcher: Yes, your Honor. I'll read the question again.

"Q. Now, is this referring to the No. 1 hatch?

"A. No. 1 hatch forward. At that time I was engaged in another emergency deal in the after deck and was on my way to that when this fellow approached me on the deck about this matter—"

The Court: I think it is there you begin your objection.

Mr. Detels: That's correct, your Honor.

Mr. Crutcher: I wish to offer the following additional portion of that answer—this is the offer:

"—and I don't know—he didn't give me the full details of just what was wrong, and I says to him—"

The Court: Are you going to offer that now, "I says to him"?

Mr. Crutcher: Yes, your Honor.

The Court: Do you object to that?

Mr. Detels: I do, your Honor. [393]

The Court: I can see it, you can mark the place. It is Line 3.

Mr. Crutcher: Yes, your Honor.

The Court: And it extends down to where?

Mr. Crutcher: It extends down to the end of the quotation of the remark made by the witness who

(Deposition of Wallace C. Hardie.)

was then testifying, "Have you tried the switches?"

The Court: Do you object to that?

Mr. Detels: I do, your Honor. I have some authority.

The Court: What authority do you have?

Mr. Detels: In the case of Dunn versus Bushman, at 169 Washington 395, the Court stated, "It is a well settled general rule that statements made by a witness to other persons are no exceptions to the hearsay rule, nor can evidence of what a witness has said out of court be received to fortify his testimony."

Mr. Crutcher: May it please the Court, this statement is not offered for the purpose of fortifying his testimony, it is offered to state what was done on this occasion. It is not hearsay in any sense of the word because the witness who stated the words was then before the Court. This is not offered for the proof of any statement about what was done, it is to show what the witness was talking about at that time, what [394] the nature of the transaction was. I respectfully submit that this is not hearsay under any definition of hearsay and that it is admissible as evidence of what was done at that time.

The Court: The Court is of the opinion that it is not admissible over objection because it is in effect permitting the witness to testify twice to the same point, once yesterday or some other day in the past, and now while he is on the stand available to testify as to what the fact is irrespective of what

(Deposition of Wallace C. Hardie.)

he may have said previously was the fact and using words which he then used to do so. It is hearsay and the Court sustains the objection.

Mr. Crutcher: Next, your Honor, I proceed to Page 6, Line 13 of the deposition of the same witness. The question is, "Did you give any instructions to the electrician?" I offer the answer.

Mr. Detels: I object to the answer on the same grounds.

The Court: What lines, please?

Mr. Crutcher: This is between Lines 14 and 15, your Honor, on Page 6, commencing with the words, "Yes, I informed him."

The Court: The objection is sustained. The word "Yes" may remain. That is the statement of a fact [395] and is not hearsay. [396]

* * *

Mr. Detels: As I recall, on Wednesday afternoon we concluded with Mr. Crutcher's direct examination in the testimony of the witness Rodney Palmer, and I did not have an opportunity to either conclude my cross-examination or to have read into the record the portions of Mr. Palmer's direct which Mr. Crutcher did not read, and I desire to do that at this time if that will suit the convenience of the Court. [397]

* * *

Mr. Detels: Initially I wish to read some portions of the direct examination into the record under the provisions of Federal Rule 26 (C) (4),

which permits the introduction of portions of a deposition not read by the person offering it.

* * *

(Thereupon, the reading of the deposition of Rodney Palmer was continued, as follows:)

DEPOSITION OF RODNEY PALMER

“Q. Now, was there anything done on the 25th?

“A. At 8:00 o'clock in the morning of Thursday the 25th, we commenced clamming out. The longshore gang was on board to discharge the barley by use of a clam. [399]

“Q. Was that work under your supervision?

“A. Yes, it was.

“Q. How far down did they operate the clam bucket? That is, how much barley did they take out?

“A. They took out enough to get to the beams in the lower hold.

“Q. Now, at that time, did you enter the No. 1 lower 'tween deck?

“A. Yes, I did.

“Q. Would you describe the circumstances under which you went down there and the reason why you went down there?

“A. I went down to put the bridles onto the beam in the lower hold so that we could continue clamming to get the barley into the lower hold.

“Q. Was there any sign of fire at that time?”

Mr. Detels: And Mr. Crutcher's question at Line 17 of the same page:

(Deposition of Rodney Palmer.)

"Q. Will you please state whether you saw any sign of fire when you went down into No. 1 lower 'tween deck on that occasion?

"A. No, I didn't." [400]

* * *

Mr. Detels: Page 42, Line 20. This testimony also refers to the date August 25th.

"Q. Did you go down into the hold again at this time?

"A. At 2:15 I descended into the hold with a small hose to spray over the area.

"Q. What sort of equipment were you wearing at that time?

"A. I had put the oxygen breathing apparatus and mask back on again which consisted of goggles and air hose."

Mr. Detels: Turning to Page 43, Line 21.

"Q. Did you direct water through the hold?

"A. There was limber holes in the coaming put in there to allow the grain to settle. I put my hand and the hose through there, directing it."

Mr. Detels: And turning to Page 44, Line 19.

"Q. Were you able to see whether there was any flame or any light coming from the other side of the limber hole?

"A. No, I couldn't observe any flame or any other light in the other side."

Mr. Detels: And now to take up the cross-examination, Page 121, Line 12.

(Deposition of Rodney Palmer.)

Cross-Examination

"Q. Now, while the vessel was at Seattle and before the [401] bulk barley was partially unloaded, was any additional cargo loaded into No. 1 hold?

"A. Can I refresh my memory?

"Q. Certainly."

Mr. Detels: The record indicates that the witness refers to the log book at this time.

The Court: And the log book has already been received in evidence as Respondent's Exhibit A-1.

Mr. Crutcher: That is correct.

"Q. You are referring to Respondent's Exhibit 'A.'

"A. Correct. Yes, they loaded cargo in No. 1 upper 'tween deck.

"Q. Do you know what that cargo was?

"A. It was just classified as general cargo.

"Q. Do you have anything available to you as a part of this deposition which would enable you to identify it more particularly than that?

"A. By using the cargo plan.

"Q. Would that assist you? (Handing same to the witness.)

"A. (Referring to Respondent's Exhibit 'B'): Evidently there is a discrepancy here between the log book and the cargo plan. The cargo plan being the final document after the vessel sailed, as to the disposition or whether the cargo had been moved—

(Deposition of Rodney Palmer.)

after they moved some of that cargo out they re-shifted it as shown on this [402] cargo plan."

Mr. Detels: And may the record show that the witness is referring to the cargo plan which has been offered here as Respondent's Exhibit A-5. Turning to Page 130—— [403]

* * *

(Respondent's Exhibit No. A-5 for identification was admitted in evidence.) [404]

* * *

Mr. Detels: Page 130, Line 19.

"Q. Now, did you make an inspection of the barley which was in proximity to the cargo lights in the other corners of the hatch opening after you went into the No. 1 lower hold?

"A. Yes, I did.

"Q. Can you describe the appearance of the barley in the [405] corners other than the port after corner?

"A. I would say it was the same as the rest of the cargo, the barley. It appeared to me in good shape."

Mr. Detels: Turning to Page 134, Line 21.

"Q. After the barley was partially discharged from the No 1 hold, did you inspect any cargo lights other than the cargo light at the port after corner in the center line section of the vessel?

"A. Checked all of the cargo lights in the lower hold.

"Q. What did you observe as far as the other cargo lights in the hold were concerned?

(Deposition of Rodney Palmer.)

"A. I think they were just in normal condition, just the same as they were when we started to load cargo.

"Q. No blackening?

"A. No.

"Q. Was there any grain adhering to any cargo light other than the one at the port after center line?

"A. No, they were all clear, free of grain.

"Q. Was there any melting or damage to the cable, as far as you could observe, on the other lights?

"A. No, there wasn't."

Mr. Detels: That concludes the cross-examination. [406]

* * *

Mr. Crutcher: Referring back now to Page 40 of Mr. Palmer's deposition, your Honor, and taking up where Mr. Detels left off with Line—

* * *

Direct Examination
(Continued)

"Q. Now, did you succeed in removing the beams from the hatch into the No. 1 lower hold?

"A. Yes, I hooked the beams on and the longshoremen moved the beams.

"Q. Were you wearing any sort of apparatus to protect yourself when you went down there? [408]

"A. An oxygen breathing apparatus to protect me against the CO₂.

(Deposition of Rodney Palmer.)

"Q. Was that a mask?

"A. That is a mask that covers your whole face.

"Q. That is, goggles and mask?

"A. Built-in goggles.

"Q. When you got through, did you come back out of the hold?

"A. Yes, I returned back on deck at that time.

"Q. Now, did they continue digging down into the barley?

"A. Yes, they did.

"Q. This was with what?

"A. The clam." [409]

* * *

"Q. How long did they continue discharging barley from the No. 1 lower hold?

"A. At 1:30 p.m. the odor of burning grain was coming out of the hold, which continued for another 20 minutes until 1:50, which burned and charred and discolored grain was coming out from beneath the after hatch coaming.

"Q. Did they stop discharging at 1:50?

"A. At 1:50 they stopped.

"Q. Did you go down into the hold again at this time?

"A. At 2:15 I descended into the hold with a small hose to spray over the area.

"Q. What sort of equipment were you wearing at that time?

"A. I had put the oxygen breathing apparatus and mask back on again which consisted of goggles and air hose."

(Deposition of Rodney Palmer.)

Mr. Crutcher: I'll go down to Line 6 on the next page.

"Q. Well, what was in the hose? Why were you taking the hose down? A. Water."

The Court: Can you repeat again for the Court's convenience the date on which this act or these acts are said to have taken place?

Mr. Crutcher: Your Honor, I think it will be agreed that we are referring to the early afternoon of [410] August 25th.

* * *

"Q. Did you spray water in the No. 1 lower hold? A. Yes, I did.

"Q. Where did you direct the water?

"A. To the after end of the hatch, port side, where the crackling noise was coming from.

"Q. How deep down into the No. 1 lower hold were you at that time?

"A. Well, just approximately to the lower end of the coaming, maybe a foot below that, approximately 4 feet into the hatchway.

"Q. Were you surrounded by barley from that position? A. Yes, I was." [411]

* * *

The Court: This is concerning your cross-libel for general average, is that right?

Mr. Crutcher: That's correct, your Honor.

PAUL LaMADE

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Mr. LaMade, will you please state your full name and spell your last name for the reporter?

A. Paul LaMade, L-a-M-a-d-e.

* * *

Q. (By Mr. Crutcher): Where do you reside, Mr. LaMade? A. In Portland. [413]

Q. What is your occupation?

A. Electrician.

Q. How long have you been an electrician?

A. Thirty-one years.

Q. Who is your employer?

A. Electro-Mechanical Company.

Q. Is that a company in Portland?

A. In Portland, yes.

Q. And what is your position with them?

A. Well, now I'm an estimator and designer.

Q. In 1954 were you employed by Electro-Mechanical Company? A. Yes.

Q. And in connection with that employment did you have occasion to supervise the installation of certain permanent cargo lights in the lower hold of the Oregon Mail? A. Yes, I did.

Q. About when was that in 1954?

A. August, I believe.

Q. Might it have been in October?

(Testimony of Paul LaMade.)

A. It could have been, yes.

Q. Mr. LaMade, showing you a lamp which has previously been marked for identification in this proceeding as Respondent's Exhibit A-15, I will ask you to examine that.

Mr. Detels: If the Court please, I wish at [414] this time to object to this line of testimony as part of the respondent's case on the cross-libel. The lamp has been fully identified and testified to by numerous witnesses on both sides.

The Court: What have you to say, Mr. Crutcher?

Mr. Crutcher: May it please the Court, the whole purpose of calling this witness is to show that this installation was properly made. I don't expect it will take more than—

The Court: It is already in, you do not need to do anything else.

Mr. Crutcher: Yes, your Honor. I merely want him to identify it.

The Court: The objection to that extent is overruled.

Q. (By Mr. Crutcher): Mr. LaMade, will you state whether the light which is now shown to you is the same type light which was installed in the Oregon Mail lower number one hold in 1954?

A. Yes, it is.

Q. And is that the same type of cable which was used in that installation?

A. I don't believe that was the type of cable, but it was similar to that.

Q. Was it a standard marine cable? [415]

(Testimony of Paul LaMade.)

A. Yes, it is.

Q. What size light bulbs were used in that installation?

A. Well, at that time we were putting in 150 watt lamps.

Q. Were those reflector flood lamps?

A. Yes.

Q. Now, Mr. LaMade, did you personally take part in the installation of those lights?

A. I supervised the installation. [416]

* * *

Q. (By Mr. Crutcher): Mr. LaMade, would you state whether you removed the old cargo lights at that time from that hold or whether they were left in place? [417] A. No, we removed them.

Q. Did you test the circuits when you completed the installation? A. Yes, we did.

Q. Would you tell the Court what that consisted of very briefly?

A. Well, firstly we check the circuit, naturally, to see if the lights are working, and we put an insulation test on it to see if they are what we call grounded or shorted to see that the circuit is clear, and if it's not we have to rectify it before we leave the job.

Q. Well, would you state to the Court whether when the installation was completed it was in working order? A. Yes, it was. [418]

* * *

HARRY DENHAM JACOBS

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name, Mr. Jacobs and spell your last name for the reporter?

A. Harry Denham Jacobs. [419]

* * *

Q. And are you an average adjuster with Horder, Jacobs & Speck? A. Yes, I am.

Q. In the course of your business as an average adjuster have you had occasion to deal with the loss and adjustments rising out of the damage to barley in the number one lower hold of the Oregon Mail in August, 1955? A. Yes, I have.

Q. And are you the one who is making the general average statement? A. I am. [420]

* * *

(Respondent's Exhibit No. A-2 for identification was admitted in evidence.) [429]

* * *

Respondent's Exhibits A-11, A-12, A-13, A-14, so far as I recall have not been offered and have not been admitted.

Mr. Crutcher: Your Honor—

The Court: They are all photographs, are they not?

Mr. Crutcher: Yes. It was stipulated between

Counsel that in lieu of calling the photographer with respect to those pictures that it would be stipulated that these are photographs taken in the after end of number one lower hold sometime after the damage—

The Court: Are Counsel agreed as to [430] whether they will be admitted or not?

Mr. Detels: I believe the date they were taken should be of record, your Honor. I have no objection if that is stated.

The Court: Will you state the date they were taken, or the approximate date?

Mr. Crutcher: Approximately August 26, 1955.

Mr. Detels: No objection.

The Court: Each of them is admitted, from A-11 to A-14, inclusive.

(Respondent's Exhibits Nos. A-11, A-12, A-13 and A-14 for identification were admitted in evidence.)

Mr. Crutcher: Your Honor, may I also state for purposes of the record, that is for purposes of identification, that A-11 is a photograph showing the light in the after port corner, a photograph previously identified by the witness Tomlin. I should say a light identified by the witness Tomlin.

A-12 is a picture of a light in the same relative position in the starboard corner of the after corner of the lower number one hold, and that A-14 and A-15 are pictures of—

The Court: A-15 is not involved in this. It is A-14. [431]

Mr. Crutcher: I beg the Court's pardon. A-13 and A-14 are pictures of unidentified portions of the deckhead aft of the hatch coaming in the number one lower hold aft.

* * *

(An average agreement was marked Respondent's Exhibit No. A-16 for identification.)

* * *

(Respondent's Exhibit No. A-16 for identification was admitted in evidence.) [432]

* * *

The Court: I notice the paper is entitled Average Agreement. Do Counsel agree that it is in truth and fact a general average agreement?

Mr. Detels: Yes, your Honor.

Mr. Crutcher: Yes, your Honor.

The Clerk: Libelant's Exhibits Nos. 6 and 7.

(A bill of lading was marked Libelant's Exhibit No. 6 for identification.)

(An invoice was marked Libelant's Exhibit No. 7 for identification.) [433]

* * *

(Libelant's Exhibits Nos. 6 and 7 for identification were admitted in evidence.)

Mr. Crutcher: Your Honor, in order that there won't be any misunderstanding, you had asked if the respondent rested.

The Court: That is exactly what the Court did and it is exactly what the Court meant. I wonder if there is anything else left that you have to offer.

Mr. Crutcher: You mean at any time until—

The Court: It does not make any difference. In the present status of the case. As far as the future status is concerned, we cannot foresee that.

Mr. Crutcher: No, I understand that. So far as the present status of the case and until the libelant rests its rebuttal case, we have none. At that time we have one expert witness whom we would like to call for brief testimony.

The Court: Concerning what?

Mr. Crutcher: Concerning the matter of flame, and the testimony by the witness Smith in yesterday's trial.

The Court: It seems to me you ought to call him to court now. What is there about any rebuttal that has been offered by the libelant that causes you now to need to introduce some sure rebuttal? [435]

Mr. Crutcher: May it please the Court, I believe it will be the position of the libelant that there is no positive evidence of flame because of course no one was down there. They have—

The Court: Many witnesses for the respondent have had their attention directed to that subject all the way through the respondent's case in chief.

Mr. Crutcher: Yes, but we saw no occasion to—

The Court: I do not see now, either. You will have to rest on the evidence already in.

Mr. Crutcher: May it please the Court, for the record I would like to state that I have present in court Mr. Francis Owens, who is a qualified cereal

chemist of long experience, and that I am prepared to offer his testimony.

The Court: Yesterday you indicated that the respondent's case in chief was complete with the exception of those depositions or something of that sort after you finished or in connection with the Court's inquiry regarding the use of live witnesses, and you then said something about after the libelant's case in chief you might want to introduce something further and the Court did not save any such opportunity.

Mr. Crutcher: If I said libelant's case in chief I misspoke myself. [436]

The Court: If I said it I did, too. I mean respondent's case in chief.

Mr. Crutcher: Well, I—

The Court: The respondent said in connection with its case in chief that the only thing it was reserving yesterday after they announced that they had no more live witnesses to call at that time was something about depositions.

Mr. Crutcher: If I may state my understanding, your Honor, it was that the libelant's witnesses in rebuttal were called out of order as a convenience to the witnesses. We made no objection, but I had not understood that the libelant rested its rebuttal case until after we had finished with our defense, and in all fairness to opposing Counsel I don't see how—

The Court: How many witnesses, how much time in respect to their testimony, do you wish to call?

Mr. Crutcher: I have one witness and I doubt if he'll be on the stand more than ten minutes.

The Court: You may have ten minutes with one more witness to introduce further evidence in the respondent's case in chief.

Mr. Detels: If the Court please——

The Court: Court is now at recess. I will hear you further after the recess. I will say this, [437] gentlemen: I have never seen a case so poorly tried from the standpoint of the order in which it is done as you two very experienced lawyers have tried this one.

(Short recess.)

Mr. Detels: If the Court please, I wish to make an urgent objection to the reopening of the respondent's case in chief with a live witness. We put in our rebuttal testimony with an expert witness yesterday afternoon under the clear understanding that all live witnesses to be called by the respondent had completed their testimony. Now, after our witness has testified from the stand the respondent is attempting to offer the testimony of another expert.

The Court: Was there any expert testimony offered by the respondent on this subject?

Mr. Detels: There was not, your Honor.

The Court: By live witnesses?

Mr. Detels: No, your Honor.

The Court: Mr. Crutcher, why did you permit opposing Counsel and the trial judge to understand that your live witness calling was completed yesterday? There were not any ifs or ands about it.

Mr. Crutcher: Your Honor, if that is accurate,

then I clearly am at fault. It was my understanding—

The Court: I am not saying what was said [438] or undertaken to be said, I am saying what the understanding was. That was my clear understanding. I had no condition at all on the subject of live witnesses. I was trying to get live witnesses finished so I could tell where we were with this case. It is certainly my understanding, whether I was justified by the words used by Counsel in so understanding or not, it was. I thought we were winding up everything yesterday so that all we would have to do would be to brush off these little written words details, particularly in these depositions comprising such great numbers.

Mr. Crutcher: I wish to apologize to the Court if I misunderstood, and I realize now that I did. It was my understanding that the Court wanted all of the live witnesses which were to precede Mr. Detels' evidence, that Mr. Detels was required to have his chemist testify yesterday out of order by reason of their personal business, and it was my understanding that our case in chief, in answer to the libelant's case, was interrupted for the purpose of permitting the libelant to offer its rebuttal evidence at that point and that all live witnesses which we were to offer in our case in chief were to be there at the same time that Mr. Detels' witnesses were. I did not understand that our rebuttal evidence was to come before Mr. Detels [439] had finished his case in chief, or I beg your pardon, his rebuttal case.

The Court: Your clients were sued, they were the respondents.

Mr. Crutcher: Yes, that's correct.

The Court: Everything that they ever expected to show on these pleadings that were in effect at the time the trial was started was supposed to be shown as a part of the respondent's case in chief.

Mr. Crutcher: That is correct, your Honor.

The Court: There cannot be any misunderstanding about that being the usual procedure.

Mr. Crutcher: Well, your Honor, as I understand the procedure, the libelant first shows, makes a *prima facie* case that we failed to deliver a certain quantity of barley. That was done in five minutes. The burden then shifted to us. We took up what was in fact the case in chief in this case by assuming the burden of showing that the loss was occasioned by reason of a fire. Then in response to that the libellant, of course, has to come back with rebuttal evidence.

Now, we offered in our case, of course, evidence of this fire. Mr. Detels then comes back in rebuttal with evidence that there wasn't a fire.

Now, I don't see how until that had been [440] done we could have an opportunity to offer our surrebuttal.

The Court: There is not any rhyme or reason to it no matter what we let ourselves get into about it, there is not any rhyme or reason about it and Counsel in the future must never permit themselves to pursue another case in this court like this. If you were just out of law school and had not had the

brilliant experience as a practitioner and a lawyer at this bar that you have had, what you say might touch a tender cord in the Court's heart or something like that, but it certainly does not with a man of the experience you have had and also Mr. Detels.

Everybody knows in this court and in this jurisdiction generally courts proceed with a trial on this fashion: Everything that the plaintiff has to sustain or has the burden of sustaining that he has alleged in his libel or complaint that is not admitted by the other side must be established once and for all in his case in chief, and after that whatever on the pleadings is something that the defendant must establish he must do it as a part of his case in chief, and then under our accepted procedure there is permitted to the suing party an opportunity for clarification by way of rebuttal testimony, and there may sometimes be permitted surrebuttal, but it is not as a matter of right at all. [441] Everybody in the world in the practice of law in this district and in this locality knows that, and I do not see how you as a practitioner of the experience you have had, Mr. Crutcher, could permit yourself to get into any such position as you are now taking.

Mr. Crutcher: Perhaps the Court—

The Court: I understand that you want to question some witness about ten minutes. Is that right?

Mr. Crutcher: That is correct, your Honor.

The Court: Where is your expert witness and what is his name?

Mr. Detels: Mr. Smith, your Honor.

The Court: Where is he?

Mr. Detels: He is as far as I know in his office at this time.

The Court: In this city?

Mr. Detels: Yes, your Honor.

The Court: Go to the phone and see if he is and have him come here immediately.

Mr. Detels: I will do that, your Honor, but I submit it is grossly prejudicial to reserve this kind of testimony until the opposition has put in its testimony on that point.

The Court: The Court notes the objection, and in view of all the circumstances we will proceed in the [442] manner I suggested at this time, with the admonition to Counsel that it will never be done again whenever I am presiding in this court.

Mr. Crutcher: May I make this one other remark, your Honor?

The Court: Yes.

Mr. Crutcher: I want it understood, the testimony of this witness is strictly surrebuttal, and I'm only asking leave of the Court to submit it when Mr. Detels has rested his rebuttal case. I don't even know that Mr. Detels has yet rested his rebuttal case.

Mr. Detels: I have rested.

The Court: Now, what is it you want to prove on this surrebuttal that you have not touched upon or have been called upon to touch upon in your case in chief?

Mr. Crutcher: To answer what his expert had to say, to show to this Court that in the opinion of a reliable and experienced chemist what his expert said simply isn't so.

The Court: I understood that his was purely rebuttal, and if you did not—

Mr. Crutcher: That is correct, your Honor. I—

The Court: He was rebutting something that came out in the respondent's case in chief. [443]

Mr. Crutcher: I also understood that.

The Court: The objection is sustained. We will not have any more evidence of that kind. It was up to the respondent to offer that as a part of respondent's case in chief.

Mr. Crutcher: May I make a remark for the record, your Honor?

The Court: You may have an exception to the Court's ruling and you may make an offer of proof in the record now.

Mr. Crutcher: Thank you, your Honor. I wish to make the following offer of proof, that the respondent American Mail Line has in court at the present time a witness named Francis Owens, who is a qualified cereal chemist; that he has made certain experiments relating to two-rowed barley such as was shipped on this occasion; that he used a lamp similar in type to that which has previously been identified as Respondent's Exhibit A-15 in connection with those experiments, and that he has made a test of the smoke which was coming from the smoke detector unit on August 23, 1955, from the Oregon Mail, and that based upon that test and based upon these experiments he arrived at a conclusion that there was a fire in the hold of the Oregon Mail and that this fire

involved both flame and glow necessarily. The respondent [444] rests, your Honor.

The Court: Will you pause for just a minute, Mr. Crutcher?

Mr. Crutcher: I beg your pardon, your Honor?

The Court: I want to hear your response. What you have said in the past does not take care of this offer. This is something new. This is an offer of proof. You may want to say something. What have you to say?

Mr. Detels: Well, I understood that the Court had ruled that it would not receive this testimony.

The Court: The Court made a ruling on what was then before the Court. It often occurs that when objecting Counsel hears the offer of proof, even though the Court had previously sustained the Counsel opposed to hearing the proof his objection to further opening up trial proceedings in the matter, that the offer of proof is considered after heard by the objecting Counsel to be innocuous and he does not object to its being admitted.

Mr. Detels: I renew my objection, your Honor.

The Court: What is it? You have heard the offer. I mean to say that since you have heard the offer does it purport to furnish evidence on any point that was not gone into as a part of the respondent's case in [445] chief and as to which respondent was not bound to go into as a part of its case in chief?

Mr. Detels: I submit that the offer shows that it was necessarily a part of respondent's case in chief, in that if the respondent had any testimony to offer

concerning experiments or tests made on the vessel or at some later time, it was under the obligation to put that proof in evidence before the close of its case in chief.

The Court: The Court sustains the objection, and one reason the Court does so is that we never would have heard the rebuttal proof including the expert witness if the Court had thought that it was being offered and being received as rebuttal of something that respondent had put out as evidence in the case in respondent's case in chief. You may proceed. I believe you said you rest.

Mr. Crutcher: The respondent rests, your Honor.

The Court: Do both sides finally rest?

Mr. Detels: Yes, your Honor.

* * *

[Endorsed]: Filed August 15, 1958. [446]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss:

I, John A. Burns, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Designation of

Counsel I am transmitting herewith as the Apostles on Appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, the following original papers in the file dealing with the action, to wit:

1. Libel, filed August 22, 1956.
6. Answer and Cross-Libel, filed Nov. 30, 1956.
9. Answer to Cross-Libel, filed May 5, 1958.
17. Pretrial Stipulation and Pretrial Order, filed May 6, 1958.
35. Statement of Facts (Court Reporter's record of proceedings), Vol. 1, filed Aug. 15, 1958.
36. Same, Vol. II, filed Aug. 15, 1958.
37. Same, Vol. III, filed Aug. 15, 1958.
28. Court Reporter's Transcript of Court's Oral Opinion, filed 5-21-58.
29. Findings of Fact and Conclusions of Law, filed May 21, 1958.
30. Decree, filed 5-21-58, for Libellant.
32. Cost Bond on Appeal and Supersedeas Bond, filed July 24, 1958.
33. Order Directing Clerk to Draw on Registry of Court for Money Deposited by Respondent, filed July 31, 1958.
34. Notice of Appeal, filed Aug. 12, 1958.
38. Designation of Record on Appeal, filed Aug. 15, 1958.
39. Order Directing Clerk to Transmit Exhibits, filed 9-11-58.

Libellant Exhibits 1 to 7, inclusive,
Respondent Exhibits A-1 to A-16, inclusive.

I further certify that the following is a true and correct statement of all expenses, cost, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me on behalf of the appellant by its proctors.

Witness my hand and official seal at Seattle this 12th day of September, 1958.

[Seal]

JOHN A. BURNS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 16186. United States Court of Appeals for the Ninth Circuit. American Mail Line, Ltd., a Corporation, Appellant, vs. Tokyo Marine & Fire Ins. Co., Ltd., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed September 15, 1958.

Docketed: September 18, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16186

AMERICAN MAIL LINE, LTD.,

Appellant,
vs.

TOKYO MARINE & FIRE INSURANCE CO.,
LTD.,

Appellee.

**STIPULATION OF ADDITIONAL MATTERS
TO BE INCLUDED IN RECORD**

It Is Stipulated between the parties that the following matters not otherwise shown in the record material to consideration of the appeal, designated by appellant, appear in the record in this cause before the United States District Court for the Western District of Washington:

1. On June 20, 1958, appellant paid \$2,616.74 into the registry of the District Court for the Western District of Washington, Northern Division, in partial satisfaction of the decree, and that amount has been withdrawn by appellee.
2. The further sum of \$5.84 has been deposited in partial satisfaction of the decree, this date.
3. The portion of testimony of Wallace C. Hardie which was admitted by the Court at pages 381, 382 of Statement of Facts, Volume II, Clerk's No. 36, lines 17 through 7, was as follows:

"He made no reference to the cluster lights. He didn't designate what kind of lights." (Deposition of Wallace C. Hardie, page 22, lines 2, 3.)

4. The testimony of Wallace C. Hardie which was offered by appellant at pages 393, 394, of Statement of Facts, Volume III, Clerk's No. 37, was as follows:

"Q. Now, is this referring to the No. 1 hatch?

"A. No. 1 hatch forward. At that time I was engaged in another emergency deal in the after deck and was on my way to that when this fellow approached me on the deck about this matter; and I don't know—he didn't give me the full details of just what was wrong, and I says to him, 'Have you put the switches on? Have you tried the switches?' "

The testimony of Wallace C. Hardie which was offered by appellant at page 395 of Statement of Facts, Volume III, Clerk's No. 37, was as follows:

"Q. Did you give any instructions to the electrician?

"A. Yes, I informed him that there was some difficulty up there and to go up and see what he could do about it."

It Is Further Stipulated that:

6. The general average statement was not completed at time of trial, and has not been completed as of the date of this stipulation.

7. The exhibits introduced at the trial may be considered in their original form, without the necessity for printing.

/s/ M. BAYARD CRUTCHER, of
Proctors for Appellant;

/s/ MARTIN P. DETELS, JR., of
Proctors for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed September 23, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in holding that appellant was dilatory or negligent in the manner it adopted to put out the fire, and that appellant was thereby deprived of the benefits of the Fire Statute and the Carriage of Goods by Sea Act, § 4(2)(b).

2. The court erred in denying appellant its claim against appellee for general average and special charges arising out of the fire.

3. The court erred in refusing to admit the night mate Hardie's testimony that he instructed the ship's electrician to go to No. 1 resistor house on the

night of August 18, to see what he could do about the lights in No. 1 hold.

BOGLE, BOGLE & GATES,

/s/ M. BAYARD CRUTCHER,
Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 23, 1958.

[Title of Court of Appeals and Cause.]

APPELLEE'S STATEMENT OF POINTS

Appellee does not appeal from the decree entered by the Court below, but states the following point on which it intends to rely on this appeal, in the event this Court overrules the District Court on the points set forth in Appellant's Statement of Points:

The District Court erred in finding and concluding that Appellant had sustained its burden of proving that the damage to the shipment of barley was caused by fire.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ W. T. BEEKS,

/s/ MARTIN P. DETELS, JR.,
Proctors for Appellee.

1111 Dexter Horton Building,
Seattle 4, Washington.

Receipt of copy acknowledged.

[Endorsed]: Filed October 2, 1958.

No. 16186

**United States Court of Appeals
For the Ninth Circuit**

AMERICAN MAIL LINE, LTD., a Corporation, *Appellant*,
vs.

TOKYO MARINE & FIRE INS. CO., LTD., a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANT'S BRIEF

BOGLE, BOGLE & GATES
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603 Central Building,
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THE ARGUS PRESS, SEATTLE

FILED

JAN 22 1959

